ORIGINAL

Case No. 83-6766

RECEIVED
MAY 21 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

JOE HAYES,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SECOND DISTRICT COURT OF APPEAL

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

MICHAEL E. RAIDEN
Assistant Public Defender
Hall of Justice Building
455 North Broadway Avenue
Bartow, Florida 33830
(813) 533-1184 or 533-0931

ATTORNEYS FOR PETITIONER

Case No.

IN THE

SUPREME COURT OF THE UNITED STATES

JOE HAYES,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SECOND DISTRICT COURT OF APPEAL

QUESTION PRESENTED

Whether Davis v. Mississippi, 394 U.S. 721 (1969), prohibits a warrantless, non-consensual detention of a citizen, undertaken without probable cause, for the purpose of obtaining that citizen's fingerprints for comparison with prints found at the scene of a crime, and whether Terry v. Ohio, 392 U.S. 1 (1968), may be extended to permit such detentions?

TABLE OF CONTENTS

	PAGE NO.
OPINIONS BELOW	4
JURISDICTION OF THE SUPREME COURT	4
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	9
APPENDIX	
1. Opinion of the Second District Court of Appeal in Hayes v. State, 439 So.2d 896	A1-9
2. Order denying rehearing in Hayes v. State	A10
3. Order of Florida Supreme Court denying discretionary review in Hayes v. State	A11
4. Information charging burglary and sexual battery	A12-13
5. Motion to Suppress, with judge's handwritten notation denying the motion	A14-16
6. Judgment and sentence	A17-21
7. Transcript of hearing on motion to suppress	A22-51
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

CASES CITED:	PAGE NO.
Anderson v. State 241 So.2d 390 (Fla.1970)	7
Bynum v. United States 262 F.2d 465 (D.C. Cir. 1958)	6
Davis v. Mississippi 394 U.S. 721 (1969)	6,7
Dunaway v. New York 442 U.S. 200 (1979)	8
Hayes v. State 439 So.2d 896 (Fla.2d DCA 1983)	4,5,7
Kinsler v. State 36 So.2d 24 (Fla.2d DCA 1978)	7
Mapp v. Ohio 367 U.S. 643 (1961)	5
Sibron v. New York 392 U.S. 40 (1968)	8
Stone v. Powell 428 U.S. 465 (1976)	8
Terry v. Illinois 444 U.S. 85	8
Terry v. Ohio 392 U.S. 1 (1968)	6,8
United States v. Sanders 477 F.2d 112 (5th Cir. 1973)	7
United States v. Seacrest 640 F.2d 81 (7th Cir. 1981)	7
Williams v. Florida 399 U.S. 78 (1970)	4
Amend.IV, U.S.Const.	4
Amend. XIV, U.S.Const.	4
Title 28, U.S.Code	4
§1257(3), U.S.S.C. Rules	4
Rule 17(1)(c), U.S.S.C. Rules	4
Art. V, §3(b)(1), Fla.Const.	4

OPINIONS BELOW

The opinion and judgment of the District Court of Appeal, Second District (Florida), sought to be reviewed via this petition is Hayes v. State, 439 So.2d 896 (Fla.2d DCA 1983). (A1-9)[1/]

JURISDICTION OF THE SUPREME COURT

The Second District Court of Appeal affirmed Petitioner's convictions for burglary and sexual battery September 16, 1983. (A1-9) Petitioner filed a motion for rehearing which was denied November 2, 1983. Petitioner then sought discretionary review in the Florida Supreme Court pursuant to Article V, Section 3(b)(1), Florida Constitution. On March 22, 1984, the Florida Supreme Court denied the Petition for Review. (A11) Cf. Williams v. Florida, 399 U.S. 78,80 n.5 (1970).

Petitioner asserted below, and asserts here, a deprivation of his rights as guaranteed under the United States Constitution, Amendments IV and XIV. Title 28 United States Code, Section 1257(3), and Rule 17(1)(c) of the United States Supreme Court Rules confer certiorari jurisdiction in this Honorable Court to review the judgment in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV to the Constitution of the United States guarantees:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

1/ References to the Record on Appeal are designated by "R" followed by the appropriate page number. References to the appendix to this petition are designated by "A" and page number.

The Fourth Amendment is applicable to the states by virtue of the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643 (1961).

STATEMENT OF THE CASE

Petitioner JOE HAYES was charged by information with burglary and sexual battery. (R1-2,A12-13)[2/] After a change of venue from Charlotte County to Hendry County, Florida, he was tried before a jury and, on July 10, 1981, was convicted of burglary and sexual battery as charged. (R56-57) On October 5, 1981, Petitioner was sentenced to 99 years in state prison by Judge James R. Adams of the Twentieth Judicial Circuit Court. (R68-70)

The pertinent facts of the case were adequately summarized by the Second District Court of Appeal, in its opinion affirming Petitioner's conviction, Hayes v. State, 439 So.2d 896 (Fla.2d DCA 1983). (A1-9)

Petitioner was one of several suspects in a series of burglary/rapes in Punta Gorda, Florida. Id., at 898. (A3) Latent fingerprints were found on the bedroom doorknob of one of the victims. Id., at 897. (A2) Desirous of obtaining Petitioner's prints for comparison, Detectives Shoup and Brady of the Punta Gorda Police Department went to Petitioner's home. Id., at 898. (A3) They did not obtain a search warrant. Id. Instead, the detectives testified that they were prepared to arrest Petitioner if he refused to cooperate, because they believed they had probable cause to do so. Id. Petitioner advised the officers he would rather accompany them to the station than submit to arrest. Id. Petitioner's prints matched those found at the crime scene, and he was arrested. Id.

2/ Petitioner was originally charged with three counts of burglary and three counts of sexual battery. (R1-2) However, he sought and obtained severance of the offenses, and proceeded to trial on Counts III and IV of the information, involving the victim Julienne Hollander. (R6-7,13,17)

On September 24, 1980, Petitioner moved to suppress the fingerprint evidence as illegally obtained. (R25-27,A14-16) The motion was heard October 20, 1980, by Judge Richard M. Stanley of the Twentieth Judicial Circuit Court. The Court denied the motion without expressly stating its reasons for doing so. (R144,A16,50) Judge Stanley's ruling provided the principal ground for appeal to the Second District Court of Appeal, as well as this petition for writ of certiorari.

The Second District Court of Appeal agreed with Petitioner on two points: (1) that it was "at best, highly questionable" that Petitioner voluntarily accompanied the officers to the police station, i.e., that the evidence of consent was less than clear and convincing; and (2) that the officers lacked probable cause to arrest Petitioner at the time they journeyed to his house. However, the Court nevertheless upheld the seizure of Petitioner's prints, ruling that the detention of Petitioner was sufficiently minimal an intrusion not to require "judicial intervention," and that it was "a logical extension" of Terry v. Ohio, 392 U.S. 1 (1968). Id., at 903. (A8)

REASONS FOR GRANTING THE WRIT

The Second District Court of Appeal was not unaware that the instant case is factually very similar to Davis v. Mississippi, 394 U.S. 721 (1969). There, the Court held that detentions undertaken for the sole purpose of obtaining fingerprints are no less subject to the constraints of the Fourth Amendment than other types of searches, citing with approval Bynum v. United States, 262 F.2d 465,467 (D.C. Cir. 1958). Id., at 724,727.

Davis went on to state that, "such detentions might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense." Id., at 727. Noting that Davis involved an interrogation as well as fingerprinting (while the instant case did not), the Florida court described the case at

bar as "pos[ing] the very question left unanswered by the court in Davis; and one apparently unaddressed since Davis. Hayes v. State, supra, at 901.

Previous Florida courts, including the Second District itself, had relied upon Davis to exclude fingerprints seized without probable cause. See, e.g., Anderson v. State, 241 So.2d 390 (Fla.1970); Kinsler v. State, 36 So.2d 24 (Fla.2d DCA 1978). Now the Second District receded from its prior position in Kinsler and found within the above-quoted language in Davis the necessary loophole to permit the warrantless seizure of Petitioner's prints.

That Petitioner's precise situation may be unaddressed in the wake of Davis apparently is true. Perhaps for that reason alone this Court would be justified in accepting Petitioner's case. Moreover, the position adopted by the Second District Court of Appeal is supportable only through an unacceptable process of catachresis. Closer examination of Davis itself, and of subsequent federal case law cited by the Second District in its opinion, demonstrates that any exception ought to be far too narrow to sustain the seizure in the case at bar.

For example, both United States v. Sanders, 477 F.2d 112 (5th Cir. 1973), and United States v. Seacrest, 640 F.2d 81 (7th Cir. 1981)(Hayes v. State, supra, at 903), involved suspects who were already in custody on other charges when their prints were obtained. How unlike that situation was the case of Petitioner, who was detained at his home and transported to a police station. Similarly, the Court noted, in Davis, at 727-728:

> Finally, because there is no danger of destruction of fingerprints, the limited detention need not come unexpectedly or at an inconvenient time. For this same reason, the general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprinting context.

Thus, while Davis may differ factually from the case at bar because Petitioner was not interrogated, neither did Davis so far relax the general warrant/probable cause requirement as to permit police intrusions as extensive as that herein...nor did the Davis court give any clue it was prepared to do so.

The second premise put forth by the court below, that this type of seizure is permitted by Terry v. Ohio, 392 U.S. 1 (1968), is so devoid of merit as to require little comment. Terry is not, and was not intended to be, an authorization for police officers to search for evidence. Any such notion was dispelled by Terry's companion case, Sibron v. New York, 392 U.S. 40 (1968), which involved an announced pat-down for drugs. Instead, Terry permits only an on-the-spot frisk for weapons during a brief investigatory detention. It was designed to protect the police officer who has a reasonable ground to fear armed assault. Dunaway v. New York, 442 U.S. 200,211-212 (1979), reaffirmed that Terry and its progeny do not permit the same "balancing test" to general evidentiary searches. More recently, in Ybarra v. Illinois, 444 U.S. 85,93-94, the Court succinctly stated,

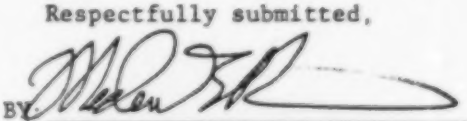
> Nothing in Terry can be understood to allow a generalized "cursory search for weapons" or, indeed, any search whatever for anything but weapons.

Petitioner has exhausted his remedies in state-level courts on this question; his options at this point are quite limited. See, e.g., Stone v. Powell, 428 U.S. 465 (1976). As a result of this appeal, the status of the Fourth Amendment in Florida is such that police may conduct searches and asport citizens from their homes without probable cause under the guise of "stop and frisk." However narrow the Second District Court of Appeal may have intended its holding to be (Hayes v. State, supra, at 903-904), there is a clear danger that its holding will be applied in any manner but narrowly. Further, this perilous situation has its genesis in the misapplication of prior holdings of this Court, and is in direct conflict therewith.

CONCLUSION

For the foregoing reasons and authorities Petitioner respectfully prays that this Court will grant this petition and issue a writ of certiorari to the Second District Court of Appeal.

Respectfully submitted,

BY 

MICHAEL E. RAIDEN
Assistant Public Defender
455 North Broadway Avenue
Bartow, Florida 33830
(813) 533-1184 or 533-0931

Member Of The Bar Of The United States Supreme Court

APPENDIX

ITEM:	PAGE NO.
1. Opinion of the Second District Court of Appeal in Hayes v. State, 439 So.2d 896	A1-9
2. Order denying rehearing in Hayes v. State	A10
3. Order of Florida Supreme Court denying discretionary review in Hayes v. State	A11
4. Information charging burglary and sexual battery	A12-13
5. Motion to Suppress, with judge's handwritten notation denying the motion	A14-16
6. Judgment and sentence	A17-21
7. Transcript of hearing on motion to suppress	A22-51

dence in the record to support the findings of the Commission, specifically the finding that the alleged acts constituted use of appellant's official position to obtain benefits inconsistent with the proper performance of his official duties.

We have also considered appellant's other contentions and find them to be without merit.

AFFIRMED.

DANAHY, A.C.J., and CAMPBELL, J., concur.

Joe HAYES, Appellant,

v.

STATE of Florida, Appellee.

No. 82-436.

District Court of Appeal of Florida, Second District.

Sept. 16, 1983.

Rehearing Denied Nov. 2, 1983.

Defendant was convicted in the Circuit Court, Charlotte County, James R. Adams, J., of burglary and sexual battery, and he appealed. The District Court of Appeal, Campbell, Acting C.J., held that: (1) trial court did not err in admitting tennis shoes seized without warrant into evidence because shoes were found on defendant's front porch, in area not constitutionally protected at time officers saw them, and (2) defendant's fingerprints, taken by police, were admissible despite absence of search warrant.

Affirmed.

1. Searches and Seizures ⇐7(10)

Tennis shoes seen on defendant's fro porch during discussion about obtaining fi gerprints were not in constitutionally pr tected area and so were subject to seizur

2. Searches and Seizures ⇐7(1)

To be valid under Fourth Amendmer search and seizure should be made on pursuant to warrant that is based up probable cause, and warrantless search per se invalid unless it falls within one carefully defined exceptions to warrant r quirement. U.S.C.A. Const.Amend. 4.

3. Arrest ⇐63.4(6)

Police officers did not have probal cause to arrest defendant at time they we to defendant's house to obtain his finge prints where officers were seeking inves gatory confrontation, had only partial d scription given in composite drawing a knowledge that defendant was suspect some other sexual batteries, and were i volved in ongoing investigation in effort solve particular crime.

4. Searches and Seizures ⇐7(1)

Strictures of Fourth Amendment app during investigatory as well as accusato or arrest stage of criminal process. U. C.A. Const.Amend. 4.

5. Searches and Seizures ⇐7(1)

Not all searches and seizures are inv id simply because probable cause is lackin because Fourth Amendment protects ci zens from unreasonable searches and s zures, Fourth Amendment does not app when official government intrusion is re sonable. U.S.C.A. Const.Amend. 4.

6. Searches and Seizures ⇐7(1)

When probable cause requirement Fourth Amendment is not implicated facts of particular case, courts must exa ine all attendant facts and circumstanc involved to determine whether governme tal intrusion was reasonable for Four Amendment purposes; in undertaking e amination, court must compare and th balance competing interests involved. U C.A. Const.Amend. 4.

A1

7. Criminal Law ⇐1224(1)

Public's, and therefore police's, legitimate interest in effective detection and prevention of crime must be balanced with individual's interest in being free from unjustified, humiliating physical intrusions as well as against individual's overall interest in privacy in making inquiry as to whether governmental intrusion was reasonable.

8. Searches and Seizures ⇐7(1)

In balancing legitimate public interest in detection and prevention of crime against individual's interest in being free from physical intrusions under Fourth Amendment, analysis must proceed at two different levels: first, there must be seizure of individual by law enforcement officials, and second, there must be search for and seizure of evidence. U.S.C.A. Const. Amend. 4.

9. Arrest ⇐68

Defendant was seized for purposes of Fourth Amendment when officers accosted him on his front porch and asked for his fingerprints. U.S.C.A. Const.Amend. 4.

10. Arrest ⇐68

Seizure of defendant which occurred when officers accosted him on his front porch and asked for his fingerprints was reasonable seizure or detention of defendant under Fourth Amendment because asking for defendant's fingerprints was sole reason for intended investigative confrontation and because no interrogation occurred. U.S.C.A. Const.Amend. 4.

11. Arrest ⇐68

For purpose of determining whether seizure of defendant was reasonable under Fourth Amendment, it did not matter that officers had to take defendant to police station to actually obtain fingerprints, as whether prints were taken at station or on defendant's front porch was immaterial. U.S.C.A. Const.Amend. 4.

12. Arrest ⇐63.5(4)

Where there is reasonable suspicion sufficient to justify stop or detention, it is permissible to stop or detain individual reasonably long enough to allay or confirm suspicions so as to cause either release or arrest of that individual.

13. Courts ⇐92

Courts are not bound by dicta in earlier cases.

14. Criminal Law ⇐1224(3)

Judicial approval or authorization is not required prior to obtaining fingerprints or handwriting samples.

15. Criminal Law ⇐334.4(9)
Searches and Seizures ⇐7(10)

Defendant's fingerprints, taken at police station after police officers went to his house to obtain them, were lawfully and reasonably "seized" for purposes of Fourth Amendment, and thus were admissible against defendant, despite fact that there was no probable cause to arrest defendant but only reasonable suspicion of criminal activity, where defendant was not arrested, but defendant was, without force being used, persuaded or even coerced into going with officers and giving his fingerprints. U.S.C.A. Const.Amend. 4.

Jerry Hill, Public Defender, and Michael E. Raiden, Asst. Public Defender, Bartow, for appellant.

Jim Smith, Atty. Gen., Tallahassee, and William I. Munsey, Jr., Asst. Atty. Gen., Tampa, for appellee.

CAMPBELL, Acting Chief Judge.

Joe Hayes appeals his convictions for burglary and sexual battery. He challenges the admission into evidence at his trial of fingerprints taken from him during a police investigation and of tennis shoes removed from the front porch of his home during the course of that same investigation. We find no error, and we affirm.

Early on the morning of May 13, 1980, a man entered the victim's home and raped her. When the man left, she called the police, and when the officers arrived, they found latent fingerprints on the doorknob of the victim's bedroom door. The police also found a herringbone pattern tennis

shoe print on the east side of the victim's front porch.

The police continued investigating this case for the next several weeks, and with the help of the victim, they prepared a composite drawing of the assailant that yielded the following description: A slender, white male with short brown hair. The police officers conducted field interviews with thirty to forty men who generally fit that description. One of the men interviewed was appellant.

Gradually, appellant emerged as a possible suspect in this and several other sexual battery cases, and so Detectives Shoup and Brady, along with the assistant police chief of Punta Gorda, went to appellant's home to obtain his fingerprints. They intended to compare these prints with the latent prints lifted from the victim's home. A search warrant was not obtained prior to going to appellant's home.

Detective Shoup later testified that they only wanted to obtain appellant's fingerprints, but he added that they were prepared to arrest appellant if he refused to cooperate because they believed they already had sufficient probable cause to do so. The officers never entered appellant's home but talked to him on his front porch. He said he would rather go with the officers to the station than be arrested. It is, therefore, at best, highly questionable that appellant's accompanying the officers to the station could be considered voluntary. While the officers stood on the front porch, they also noticed a pair of herringbone pattern tennis shoes lying on the front porch.

Appellant went to the station with the officers and allowed them to take his fingerprints. When the police compared these prints with the latent prints removed from the crime scene, they found that the prints matched, and appellant was thereafter arrested for and later charged with burglary and sexual battery.

Appellant sought, both before and during trial, to suppress the fingerprints and tennis shoes seized during the police investigation. The trial judge refused to suppress these articles of evidence, and the jury eventually found appellant guilty as charged.

[1] Initially, we note that even though the officers did not have a warrant, *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), does not apply here since the discussion about fingerprints and the seizure of the tennis shoes occurred on the front porch of appellant's home. Because the officers found the shoes on appellant's front porch, the trial court did not err in admitting the shoes into evidence. *State v. Rickard*, 420 So.2d 303 (Fla.1982), demonstrates that these shoes clearly were not in a constitutionally protected area at the time the officers saw them and so were subject to seizure.

[2] We move then to a consideration of the stop of appellant and the seizure of his fingerprints, and we begin and end with an examination of the fourth amendment. Generally, to be valid under the fourth amendment, a search and seizure should be made only pursuant to a warrant that is based upon probable cause. In fact, a warrantless search is per se invalid unless it falls within one of the carefully defined exceptions to the warrant requirement. *Engle v. State*, 391 So.2d 245 (Fla. 5th DCA 1980); *Ulesky v. State*, 379 So.2d 121 (Fla. 5th DCA 1979).

[3, 4] However, law enforcement officials frequently make a determination of probable cause, based upon the facts before them, that is later judicially sustained. Here, the police officers believed they had probable cause sufficient to arrest appellant before they obtained his fingerprints. However, we conclude that the officers did not have probable cause at that point in the investigation. The officers were seeking an intended, investigatory confrontation, an encounter in which law enforcement officials frequently engage. Such confrontations may occur in the context of preventing a crime from occurring, or, as here, where officers are involved in an ongoing investigation in an effort to solve a particular crime. At the time the officers approached appellant's home, they had only

A3

the partial description given in the composite drawing to guide them and the knowledge that appellant was evidently a suspect in some other sexual batteries. These factors were alone insufficient to give the officers probable cause to arrest appellant. Since they did not have probable cause to arrest appellant, we must determine whether appellant's encounter with the police may be lawfully explained in another manner. To answer this question, we still must examine the fourth amendment because clearly the strictures of that amendment apply during the investigatory as well as the accusatory or arrest stage of the criminal process. *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). However, to resolve this issue, we must examine that amendment from another perspective.

[5, 6] Not all searches and seizures are invalid simply because probable cause is lacking. In *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the United States Supreme Court upheld a policeman's stop and frisk of a person whom he suspected of being involved in criminal activity. In reaching its conclusion, the Court set out a very limited context in which the probable cause requirement of the fourth amendment does not apply. The focus for the Court in *Terry* and the focus which we follow here is whether the official governmental intrusion was reasonable. This focus is dictated by the very language of the amendment because it is beyond peradventure that the fourth amendment protects citizens from *unreasonable* searches and seizures, not *all* searches and seizures. *Terry; Elkins v. United States*, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960); *Gaskins v. State*, 89 So.2d 867 (Fla.1956); *State v. White*, 312 So.2d 475 (Fla. 4th DCA 1975); *Gilbert v. State*, 289 So.2d 475 (Fla. 1st DCA), *cert. denied*, 294 So.2d 660 (Fla.1974); *Webster v. State*, 201 So.2d 789 (Fla. 4th DCA 1967). And when the probable cause requirement of the fourth amendment is not implicated in the facts of a particular case, courts must then examine all the attendant facts and circumstances involved to determine whether that governmental intrusion was reasonable for fourth amendment purposes. *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); *Longo v. State*, 157 Fla. 668, 26 So.2d 818 (1946); *Starks v. State*, 108 So.2d 738 (Fla. 2d DCA 1959). In undertaking this examination, a court must compare and then balance the competing interests involved. *Brignoni-Ponce; Terry; Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967).

[7, 8] The public, and through it the police, has an understandably strong interest in effective detection and prevention of crime. As the Court stated in *Terry*, "it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to arrest." 392 U.S. at 22, 88 S.Ct. at 1880, 20 L.Ed.2d at 906. This legitimate interest must be balanced in turn with the individual's interest in being free from unjustified, humiliating physical intrusions as well as against his overall interest in privacy. In making this inquiry under the fourth amendment, courts must be cognizant that the analysis must proceed at two different levels. First, there must be a seizure of the individual by law enforcement officials. Then, there must be a search for and a seizure of evidence. *United States v. Dionisio*, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973).

[9, 10] Appellant clearly was seized for purposes of the fourth amendment when the officers accosted him on his front porch and asked for his fingerprints. Because this was the sole reason for this intended investigative confrontation and because no interrogation occurred, we conclude that under the narrow circumstances of this case, this was a reasonable seizure or detention of appellant under the fourth amendment.

[11] It does not matter that the officers had to take appellant to the police station to actually obtain his prints. Whether the

prints were taken at the station or on appellant's front porch is immaterial. *State v. Merklein*, 388 So.2d 218 (Fla. 2d DCA 1980), *petition for review denied*, 392 So.2d 1377 (Fla.1981), illustrates why this is so. There, sheriff's deputies were responding to an attempted robbery that occurred on Siesta Key. One deputy broadcast a BOLO describing the getaway car and the two suspects inside. Other deputies covered the bridges leading to the mainland and stopped several vehicles that fit the description in the BOLO. The defendant and his companion were stopped, and then they were held until another deputy could transport the victim and the witnesses to the scene for purposes of identification. This court found that this was a reasonable detention. "It is permissible to detain suspects for a reasonable time to investigate the circumstances warranting an investigatory stop as well as any suspicious circumstances produced by the stop." 388 So.2d at 219.

[12] Like the detention in *Merklein*, the detention here occurred during the investigatory stage of the criminal process. In these circumstances, it does not matter who is moved, the victim or the suspect. By way of analogy and in support of the view we follow here, it should be noted that in *Pardo v. State*, 429 So.2d 1313 (Fla. 5th DCA 1983), the defendant was removed from the scene of an accident, taken to a hospital, and there had a blood specimen taken from him. The specimen was later used against him in his trial for manslaughter while driving while intoxicated. The movement to the hospital prior to taking the blood specimen did not render the specimen inadmissible at trial. Where there is a reasonable suspicion sufficient to justify a stop or detention, it is permissible to stop or detain an individual reasonably long enough to allay or confirm suspicions so as to cause either release or arrest of that individual. This principle applies here because if it is reasonable to take a suspect to a hospital for a blood test to obtain evidence in regard to a manslaughter charge, it seems to us it is also reasonable to take a suspect in a rape case to the police station to obtain fingerprint comparisons.

Since we conclude that appellant was lawfully detained, or seized for purposes of the fourth amendment, we move to the next level to determine whether the taking of appellant's fingerprints was likewise a reasonable search and seizure under the fourth amendment.

In *Davis v. Mississippi*, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969), the United States Supreme Court held that fingerprints obtained from the petitioner in that case had been seized during a detention violative of the fourth and fourteenth amendments. The petitioner was one of twenty-four black youths taken to police headquarters during an investigation in a rape case. The victim had described her assailant only as a young black male. During the detention, the youths, including the petitioner, were fingerprinted, questioned, and released. The petitioner was detained again a few days later, jailed, given a lie detector test, and fingerprinted again. The Court reversed, noting that there had been "no attempt ... to employ procedures which might comply with the requirements of the Fourth Amendment." 394 U.S. at 728, 89 S.Ct. at 1398, 22 L.Ed.2d at 681. Although not necessary to the decision in *Davis*, the Court addressed the question of a detention solely for the purpose of obtaining fingerprints:

> Detentions for the sole purpose of obtaining fingerprints are no less subject to the constraints of the Fourth Amendment. It is arguable, however, that, because of the unique nature of the fingerprinting process, such detentions might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense. See *Camara v Municipal Court*, 387 US 523, 18 L Ed 2d 930, 87 S Ct 1727 (1967). Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. Fingerprinting involves none of the probing into an indi-

vidual's private life and thoughts that marks an interrogation or search. Nor can fingerprint detention be employed repeatedly to harass any individual, since the police need only one set of each person's prints. Furthermore, fingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper line-up and the "third degree." Finally, because there is no danger of destruction of fingerprints, the limited detention need not come unexpectedly or at an inconvenient time. For this same reason, the general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprinting context.

We have no occasion in this case, however, to determine whether the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest.

394 U.S. at 727–28, 89 S.Ct. at 1397–98, 22 L.Ed.2d at 681. The Court in *Davis* did not need to decide that question because, under the facts of that case, it was unnecessary to do so. The Court ruled that the fingerprint evidence was inadmissible explicitly because the police officers *interrogated* the petitioner in addition to merely taking his fingerprints.

The instant case poses the very question left unanswered by the Court in *Davis*, and we note that this issue has not been directly addressed since the *Davis* decision. *See United States v. Thomann*, 609 F.2d 560 (1st Cir.1979). Our study of *Davis* and its progeny has revealed that the precise holding of *Davis*, which we have just described, as well as the meaning and import of that decision, has been misconstrued. *See Bacon v. United States*, 449 F.2d 933 (9th Cir.1971). *See also Hamrick v. Wainwright*, 465 F.2d 940 (5th Cir.1972). For example, in *Dunaway v. New York*, the Court, while again asserting the notion that it is permissible under certain circumstances to take fingerprints absent probable cause, seemed to imply in an earlier paragraph of the same opinion that it had rejected that very argument in *Davis*.

Of course, the Court did not reject that argument in *Davis*, and in any event, the facts in *Dunaway* in no way involved or concerned the taking of a suspect's fingerprints during the course of an ongoing criminal investigation. There, the police, during the course of a murder investigation, took the petitioner to the station, placed him in an interrogation room, gave him *Miranda*[1] warnings, and questioned him. He was never told he was under arrest, and the officers did not obtain a warrant because they did not believe they had probable cause. Eventually, he made an incriminating statement which was later determined to be the fruit of an illegal detention. Thus, *Dunaway* is inapposite to the instant case, except insofar as it stands for the proposition we earlier stated; the fourth amendment applies to the investigatory as well as the accusatory stage of the criminal process.

[13] Our state courts have also touched on the issue before us on occasion; however, each case is factually distinguishable and, therefore, inapplicable to the instant case. In *Anderson v. State*, 241 So.2d 390 (Fla.1970), *vacated*, 408 U.S. 938, 92 S.Ct. 2868, 33 L.Ed.2d 758 (1972),[2] the defendant was arrested and fingerprinted and later obtained counsel. Later, the police took his palmprint without advising him of his rights. The court held that this action did not violate the defendant's right to be free from self-incrimination. Citing *Davis*, and apparently misconstruing it, the court in

1. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

2. The case was vacated "insofar as it leaves undisturbed the death penalty imposed ...." 408 U.S. at 845, 92 S.Ct. at 2845, 33 L.Ed.2d at 744. *See Stewart v. Massachusetts*, 408 U.S. 845, 92 S.Ct. 2845, 33 L.Ed.2d 744 (1972).

dicta indicated that taking the fingerprints of a suspect before arrest and without probable cause was violative of the fourth amendment. However, as we have indicated, *Davis*, in fact, left open that precise question, and so the language in *Anderson*, being dicta by which we are not bound, does not prevent us from reaching and deciding that question. Years ago, Mr. Justice Whitfield explained why this is so:

> It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit where the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated. It cannot be reasonably expected that every word, phrase or sentence contained in a judicial opinion will be so perfect and complete in comprehension and limitation that it may not be improperly employed by wresting it from its surroundings, disregarding its context and the change of facts to which it is sought to be applied, as nothing short of an infinite mind could possibly accomplish such a result. Therefore, in applying cases which have been decided, what may have been said in an opinion should be confined to and limited by the facts of the case under consideration when the expressions relied upon were made, and should not be extended to cases where the facts are essentially different. When this rule is followed, much of the misapprehension and uncertainty that often arise as to the effect of a decision will be practically avoided.
>
> What is said in an opinion upon a point not raised or properly involved cannot control in a subsequent case where the very point is presented for decision. *Union Tank Line Co. v. Wright*, 249 U.S. 275 [39 S.Ct. 276, 63 L.Ed. 602], 39 Sup.Ct. Rep. 276. General words used in a judicial opinion should be construed with such limitations as are required by a refernce (sic) to the facts in the case.

Ex Parte: Ernest Amos, 93 Fla. 5, 20–22, 112 So. 289, 294–95 (1927) (en banc) (Whitfield, J., concurring) (citations omitted). This old and well established judicial principle is still valid and has been consistently applied. *Ard v. Ard*, 395 So.2d 586 (Fla. 1st DCA 1981); *Bunn v. Bunn*, 311 So.2d 387 (Fla. 4th DCA 1975); *Weisenberg v. Carlton*, 233 So.2d 659 (Fla. 2d DCA), *cert. denied*, 240 So.2d 643 (Fla.1970); *Booth v. Mary Carter Paint Co.*, 182 So.2d 292 (Fla. 2d DCA 1966).

In *Kinsler v. State*, 360 So.2d 24 (Fla. 2d DCA 1978), the defendant allowed police officers to take a footprint impression from him, and this court, relying on *Davis* and the *Anderson* dicta, found that this action violated the defendant's fourth amendment rights. However, there, a key factor for the court was the defendant's status as a parolee and his parole officer's statement that if he refused to submit he would be in violation of his parole. Notwithstanding, to the extent that *Kinsler* followed the dicta in *Anderson* which sprang from an erroneous application of *Davis*, we hereby recede from that portion of our *Kinsler* decision.

There are a number of cases that address situations similar to the one presented here, and having examined these cases, we conclude that the fingerprints were properly seized and, therefore, properly admitted into evidence against appellant.

In *United States v. McCarthy*, 297 F.2d 183 (7th Cir.1961), *cert. denied*, 369 U.S. 850, 82 S.Ct. 933, 8 L.Ed.2d 9 (1962), the court affirmed McCarthy's bank robbery conviction. He argued that prints taken from him by an F.B.I. agent who persuaded him to go downtown and give his prints should be suppressed because they had been seized in violation of the fourth amendment. The court, in affirming, held otherwise, and this case seems to represent the clearest example of the situation left open in *Davis*, aside

from the one presented here. Cases decided after *Davis* that have touched on this issue and similar ones dealing with physical evidence have also allowed such evidence to be admitted.

In *United States v. Sanders*, 477 F.2d 112 (5th Cir.), *cert. denied*, 414 U.S. 870, 94 S.Ct. 88, 38 L.Ed.2d 58 (1973), the court affirmed the admission into evidence of palmprints taken from Sanders. The court noted that at the time the palmprints were taken, Sanders was lawfully in custody on another unrelated matter. Appellant was likewise lawfully seized. As far as the actual taking of the palmprints, the court concluded that taking palmprints, like the taking of fingerprints here, is much less intrusive than an interrogation or a full-blown search of the person.

In *United States v. Harris*, 453 F.2d 1317 (8th Cir.1972), *cert. denied*, 412 U.S. 927, 93 S.Ct. 2755, 37 L.Ed.2d 154 (1973), the court found no error in the admission of handwriting exemplars given by the defendant. The defendant there was a suspect in a case involving the theft of a check which he had endorsed. Some postal inspectors visited Harris in his home and in the presence of his parents informed him of the ongoing investigation and asked him for his handwriting sample. The court found that the postal inspectors' conduct was reasonable because Harris was never under any type of pressure, coercion or duress. The court stated with reference to the inspectors' conduct that "it appears to be the most logical and reasonable course of conduct to pursue." 453 F.2d at 1321. Likewise here, the officers, in attempting to solve a serious crime, tried to tie up the strongest lead they had, fingerprints, with a suspect.

In *United States v. Sechrist*, 640 F.2d 81 (7th Cir.1981), the court affirmed the earlier denial of Sechrist's motion to suppress his fingerprint evidence. The court noted that like the defendant in *Sanders*, Sechrist was lawfully in custody on another matter at the time his fingerprints were taken. Since he was, therefore, lawfully seized for fourth amendment purposes, like appellant here, the court examined only the taking of the fingerprints from Sechrist and concluded that the process was so minimally intrusive that it was wholly reliable and, therefore, did not violate the fourth amendment.

Therefore, it is clear from *McCarthy*, *Harris*, *Sanders* and *Sechrist* that such a minimal intrusion upon appellant in this case did not infringe any of his fourth amendment rights. Though he was not in legal *custody*, he was lawfully and reasonably "seized" for purposes of the fourth amendment. This seems to us a logical extension of *Terry*. Unlike the petitioner in *Davis*, there is no evidence that he was subjected to interrogation.

[14] Finally, we note that in *McCarthy*, *Harris* and *Sanders*, the courts did not require that there be judicial approval or authorization prior to obtaining prints or handwriting samples. Neither do we conclude that there should be such intervention for we do not deal here with a question of probable cause. Requiring this type of judicial intervention at this stage of a criminal investigation would unnecessarily hamper efforts both to prevent and to solve crimes. Carried to its logical extreme, such a rule would render *Terry* a complete nullity.

[15] It would appear by implication from *Davis* and many other cases that had the officers arrested appellant under a mistaken belief that they had probable cause, taken him to the station, booked him, fingerprinted him, and nothing more, the fingerprints would be admissible in evidence even though the arrest was later invalidated. Thus, it would seem that where, as here, appellant was not arrested, there was no probable cause but only a reasonable suspicion of criminal activity, and where appellant was, without force being used, persuaded or even coerced into going with the officers and giving his fingerprints, and nothing more, those prints would also be admissible.

However, this decision should not in any way be construed as giving law enforcement officers carte blanche to fingerprint every person suspected of committing a

A-8

crime currently under investigation. We hold only that under the narrow facts of this case, the government's legitimate interest in law enforcement, specifically, the solving of a violent crime, outweighed appellant's interest in privacy as defined by the fourth amendment.[3] The initial seizure of appellant was reasonable as was the seizure of his fingerprints. As we have earlier stated, the seizure of the tennis shoes presents no fourth amendment problems.

We have examined the remaining points on appeal, and we find them to be without merit.

AFFIRMED.

SCHOONOVER and LEHAN, JJ., concur.

AMERICAN DIVERSIFIED INSURANCE SERVICES, INC., a Florida corporation, Appellant,

v.

UNION FIDELITY LIFE INSURANCE COMPANY, an insurance corporation, Ron Holmer, and Michael E. McBryan, Appellees.

No. 82-2865.

District Court of Appeal of Florida, Second District.

Sept. 16, 1983.

Rehearing Denied Oct. 31, 1983.

Insurance agency brought suit against insurance company, company employee, and a former agency employee, alleging conspiracy to destroy agency's business. The Circuit Court, Pinellas County, Robert F. Michael, J., dismissed the complaint, and the agency appealed. The District Court of Appeal, Lehan, J., held that agency stated cause of action in complaint for civil conspiracy based upon the independent tort of intentional interference with business relationships, and should have been given opportunity to prove its allegations.

Reversed and remanded.

1. Conspiracy ⇐8

A cause of action for civil conspiracy exists if basis for conspiracy is an independent wrong or tort which would constitute a cause of action if the wrong were done by one person, or if conduct complained of would not be actionable if done by one person, but by reason of force of numbers or other exceptional circumstances, defendants possess some peculiar power of coercion, which gives rise to an independent tort of conspiracy, sometimes referred to as an "economic boycott."

2. Conspiracy ⇐1

Maliciousness will not transform otherwise proper conduct into a civil conspiracy.

3. Conspiracy ⇐18

Complaint filed by insurance agency did not allege economic boycott claim, because allegations did not show that defendants, by force of numbers or other exceptional circumstances, attempted to destroy insurance agency's business by acting together.

4. Conspiracy ⇐18

Insurance agency's complaint stated cause of action for civil conspiracy based upon tort of intentional interference with business relationships, where insurance agency alleged that defendants diverted to another agency certain inquiries and leads received from insurance agency's customers at time when defendants were third parties to the business relationship existing between insurance agency and its policyholders.

3. Although we have not discussed it, obviously the fourth amendment is made applicable to the states by operation of the fourteenth amendment.

A9

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

NOVEMBER 2, 1983

JOE HAYES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 82-436

Received By

NOV 0 4 1983

Appellate Division
Public Defenders Office

Counsel for appellant having filed a motion for rehearing, rehearing en banc, and/or certification of question in the above-styled case, upon consideration, it is

ORDERED that said motion is hereby denied. It is further

ORDERED that appellee's motion to strike is denied.

A TRUE COPY
TEST:

CLERK DISTRICT COURT OF APPEAL
SECOND DISTRICT

cc: William I. Munsey
Michael E. Raiden

A10

Supreme Court of Florida

THURSDAY, MARCH 22, 1984

JOE HAYES,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 64,502

District Court of Appeal,
2d District - No. 82-436

Received By

MAR 2 8 1984

Appellate Division
Public Defenders Office

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

ALDERMAN, C.J., BOYD, McDONALD and EHRLICH, JJ., Concur
ADKINS, OVERTON and SHAW, JJ., Dissent

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

By: Debbie Causseaux
Deputy Clerk

cc: Hon. William A. Haddad, Clerk
Hon. Buddy Clark Alexander, Clerk
Hon. James R. Adams, Judge
Michael E. Raiden, Esquire
William I. Munsey, Jr., Esquire

A11

In The Circuit Court Of The Twentieth Judicial Circuit Of The State Of Florida

For Charlotte County, in the year of our Lord One Thousand Nine Hundred and ~~Seventy~~ Eighty

STATE OF FLORIDA

vs.

JOE HAYES

80-156-CF-A-RMS

INFORMATION FOR

COUNT I, III, V: BURGLARY OF DWELLING
COUNT II, IV, VI: SEXUAL BATTERY

STATUTE: 810.02, 794.011(5)

IN the Name and by Authority of the State of Florida:

EUGENE C. BERRY, Assistant State Attorney of the Twentieth Judicial Circuit of the State of Florida, prosecuting for the State of Florida, in the County of Charlotte under oath information makes that

JOE HAYES

late of the County and State aforesaid, on the "SEE BELOW" day of "SEE BELOW"

in the year of our Lord One Thousand Nine Hundred and ~~Seventy~~ Eighty, in the county and state aforesaid

COUNT I: did on April 27, 1980, unlawfully enter or remain in a certain dwelling, located at 401 SHREVE STREET, Punta Gorda, in the County and State aforesaid, the property of VELORA DAVIS, as owner or custodian thereof, with the intent to commit an offense therein, to-wit: ASSAULT, said dwelling being occupied by VELORA DAVIS, a human being, and said JOE HAYES did make an assault upon VELORA DAVIS, in violation of F.S. 810.02(1)(2)(a);

COUNT II: did on April 27, 1980, unlawfully commit a sexual battery upon VELORA DAVIS, 82 years of age, without said victim's consent, by vaginal and anal penetration by the sex organ of another and in the process thereof used physical force and violence not likely to cause serious personal injury, in violation of F.S. 794.011(5);

COUNT III: did on May 13, 1980, unlawfully enter or remain in a certain dwelling, located at 401 W. RETTA ESPLANADE, Punta Gorda, in the County and State aforesaid, the property of JULIANNE HOLLANDER, as owner or custodian thereof, with the intent to commit an offense therein, to-wit: ASSAULT, said dwelling being occupied by JULIANNE HOLLANDER, a human being, and said JOE HAYES did make an assault upon JULIANNE HOLLANDER, in violation of F.S. 810.02(1)(2)(a);

COUNT IV: did on May 13, 1980, unlawfully commit a sexual battery upon JULIANNE HOLLANDER, 50 years of age, without said victim's consent, by vaginal and anal penetration by the sex organ of another and in the process thereof used physical force and violence not likely to cause serious personal injury, in violation of F.S. 794.011(5);

COUNT V: did on May 18, 1980, unlawfully enter or remain in a certain dwelling, located at 140 CIRCLE DRIVE, MUNICIPAL MOBILE HOME PARK, Punta Gorda, in the County and State aforesaid, the property of HELEN SMITH, as owner or custodian thereof, with the intent to commit an offense therein, to-wit: ASSAULT, said dwelling being occupied by HELEN SMITH, a human being, and said JOE HAYES did make an assault upon HELEN SMITH, in violation of F.S. 810.02(1)(2)(a);

COUNT VI: did on May 18, 1980, unlawfully commit a sexual battery upon HELEN SMITH, 60 years of age, without said victim's consent, by vaginal penetration by the sex organ of another and in the process thereof used physical force and violence not likely to cause serious injury, in violation of F.S. 794.011(5);

Contrary to the statute in such case made and provided and against the peace and dignity of the State of Florida.

Assistant State Attorney, Twentieth Judicial Circuit
State of Florida

A12

State of Florida
County of CHARLOTTE

Personally appeared before me, EUGENE C. BERRY, Assistant State Attorney of the Twentieth Judicial Circuit of the State of Florida, who being duly sworn, says that he files this information in good faith and certifies that he has received testimony under oath from the material witness or witnesses for the offense, and the allegations as set forth in the information, if true, would constitute the offense therein charged.

E. C. Berry

Sworn to and subscribed before me this 15th day of July, A.D. 19 80

Suzanne Attias
Notary Public, State of Florida at Large
My Commission Expires May 31, 1983
Bonded By American Fire & Casualty Company

In Circuit Court
Twentieth Judicial Circuit
COUNTY, FLORIDA

THE STATE OF FLORIDA

vs.

INFORMATION FOR

Presented by the State Attorney prosecuting in said county, and filed this _____ day of _____, 19___

Clerk Circuit Court

Joseph D'Alessandro
State Attorney

A1

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR CHARLOTTE COUNTY, FLORIDA CRIMINAL DIVISION

STATE OF FLORIDA,

Plaintiff,

vs. Case No. 80-156-CF-A-RMS

JOSEPH HAYES,

Defendant.

MOTION TO DISMISS INFORMATION AND TO DISCHARGE DEFENDANT AND/OR TO SUPPRESS EVIDENCE

COMES NOW JOSEPH HAYES, by his Court appointed lawyer, ROBERT "BOB" BADER, and pursuant to the applicable provisions of F.R.Cr.P. 3.190, moves to dismiss the Information, and/or suppress evidence, and in support thereof says:

1. That the arrest of JOSEPH HAYES on June 23rd, 1980, was without probable cause; in that, at the time of the defendant's arrest, there was insufficient evidence to identify the defendant as the perpetrator of any of the charges in this Information.

2. The facts in support of this contention are as follows:

a. There had been no positive identification of this defendant by any of the alleged victims.

b. The police relied upon information from a "confidential informant", who did not identify this defendant as being in any of the subject homes, or committing the act, but who allegedly identified the defendant as being in the area.

c. Said confidential informant is unreliable, and the testimony given does not meet any of the requirements for a confidential informant. (See Spahelli vs. United States, 393 U.S. 410) and (State vs. Wolfe, 310 S. 2nd, 729).

3. The evidence obtained from the defendant was in violation of his constitutional rights under the 4th, 5th, 6th, and 14th Amendments of the U.S. Constitution.

WHEREPORE, JOSEPH HAYES, by his Court appointed lawyer, moves to suppress the following evidence:

a. All fingerprints taken from the defendant.

b. All photographs taken of the defendant used in a "purported" photo lineup.

A14

c. One pair of tennis shoes taken from the premises of the defendant, without a search warrant.

4. In support of this motion, the defendant says that at the time that he was taken into custody by the officers of the Punta Gorda Police Department, there was insufficient evidence to identify him as the defendant in this case, notwithstanding the suspicions of the police officers.

5. The only creditable identification which the authorities have was obtained after his illegal detention, by compelling him to submit to fingerprints, and verifying those fingerprints with alleged latent fingerprints taken at the scene of the crime and confirming their similarity. Then, and only then, did the State formally inform the defendant of his Miranda rights and charge him with the crimes set forth in this Information.

6. The facts and circumstances leading to this event are more fully set forth herein:

a. On the evening of June 23rd, 1980, without probable cause, three officers of the Punta Gorda Police Department went to the residence of the defendant, and asked him to "voluntarily" come down to the Police Station for the purpose of having his fingerprints taken, as they were (sic) investigating alleged "burglaries" in the city. When the defendant refused to voluntarily come, the officers advised the defendant that they had the authority to arrest him then and there on the crime of burglary; but if he would voluntarily come to the Police Station, they would not do so.

b. Acting in fear of his arrest, and in reliance upon the threat and the power and authority to arrest him, JOSEPH HAYES accompanied the officers in a police car to the Punta Gorda Police Station.

c. By pre-arrangement, the police officers had a Deputy Sheriff and presumed fingerprint expert available, and upon arriving at the Police Station, proceeded to fingerprint and photograph the defendant, holding him in a back room; whereupon the fingerprints thus obtained, were compared with purported latent fingerprints taken at the scene of the crime, and were identified as being the same as JOSEPH HAYES by the Deputy Sheriff.

d. Then, and only then, did the Police Officers inform the defendant he was under arrest, and inform him of his Miranda rights, including his right to counsel.

WHEREFORE, as a consequence of the illegal detention and the improper methods used in obtaining evidence against the defendant, JOSEPH HAYES, by his Court appointed attorney, moves for an Order dismissing the Information, suppressing all of the above stated evidence, and discharging the defendant, and ordering his immediate release from custody.

The undersigned makes the preceding motion under oath, and swears that the facts alleged herein are true and correct to the best of his knowledge, and are predicated upon the sworn depositions of the arresting officers, which have or will be filed herein, and requests an evidentiary hearing on this motion.

I HEREBY CERTIFY that a copy of the foregoing Motion has been hand delivered to the Assistant State Attorney, Charlotte County Courthouse, Punta Gorda, Florida, 33950, this 24th day of September, 1980.

10/20/80
The motion incorporating all pertinent theretofore filed - RMS -

ROBERT "BOB" BADER,
Attorney for Defendant,
P. O. Box 267,
Punta Gorda, Florida, 33950,
(813) 625-4180.

STATE OF FLORIDA
COUNTY OF CHARLOTTE

BEFORE ME, the undersigned authority, appeared ROBERT "BOB" BADER, the Court appointed defense lawyer for JOSEPH HAYES, and states that the above facts and information are true and correct.

Sharon K. Radford
Notary Public

My Commission Expires:

Notary Public, State of Florida at Large
My Commission Expires Sept. 17, 1983
Bonded by American Fire & Casualty Company

☐ PROBATION VIOLATOR
(Check if Applicable)

IN THE CIRCUIT COURT TWENTIETH
JUDICIAL CIRCUIT, IN AND FOR
CHARLOTTE COUNTY, FLORIDA
DIVISION CIRCUIT-FELONY
CASE NUMBER 80-156-CF-A-RMS

STATE OF FLORIDA

-vs-

JOE HAYES
Defendant

JUDGMENT

The Defendant, JOE HAYES, being personally before this Court represented by ROBERT "BOB" BADER, COURT APPOINTED, his attorney of record, and having:

(Check if Applicable)
- XX Been tried and found guilty of the following crime(s)
- ☐ Entered a plea of guilty of the following crime(s)
- ☐ Entered a plea of nolo contendere to the following crime(s)

COUNT	CRIME	OFFENSE STATUTE NUMBER(S)	DEGREE OF CRIME	CASE NUMBER
3	BURGLARY OF DWELLING	810.02(2)(1)(2)(a)	LIFE	80-156-CF-
4	SEXUAL BATTERY	794.011(5)	SECOND	80-156-CF-

.d no cause having been shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the defendant is her DJUDICATED GUILTY of the above crime(s).

****

The Defendant is hereby ordered to pay the sum of ten dollars ($10.00) pursuant to F.S. 960.20 (Crimes Compensation Trust Fund). The Defendant is further ordered to pay the sum of two dollars ($2.00) as a court cost pursuant to F.S. 943.25(4).

(Check if Applicable)
- ☐ The Defendant is further ordered to pay an additional two ($2.00) pursuant F.S. 943.25(8) (This provision is optional; not applicable unless checked).
- ☐ The Court hereby imposes a fine in the sum of $_____

A17

63

OTE: This page is to be completed ONLY where sentence is stayed and withheld or deferred until a later date.

Imposition of Sentence Stayed and Withheld *(Check if Applicable)* ☐ The Court hereby stays and withholds the imposition of sentence and places the defendant on probation for a period of _____ under the supervision of the Department of Corrections (conditions of probation set forth in separate order).

Sentence Deferred *(Check if Applicable)* ☐ The Court hereby defers imposition of sentence until _____ (date)

The Defendant in Open Court was advised of his right to appeal from this Judgment by filing notice of appeal within thirty ays from this date with the Clerk of this Court, and the Defendant[s entitlement to the assistance of counsel in taking said appeal at ɔe expense of the State upon showin of indigency.

FINGERPRINTS OF DEFENDANT

1. R. Thumb	2. R. Index	3. R. Middle	4. R. Ring	5. R. Little
6. L. Thumb	7. L. Index	8. L. Middle	9. L. Ring	10. L. Little

Fingerprints taken by:

_____
Name and Title

DONE AND ORDERED in Open Court at _____ County, Florida, this _____ day of _____ A.D., 19____. I HEREBY CERTIFY that the above and foregoing fingerprints are the fingerprints of the Defendant, _____ and that they were placed thereon by said Defendant in my presence in Open Court this date.

/

_____
JUDGE

111

A18

Defendant JOE HAYES

Case Number 80-156-CF-A-RMS

SENTENCE

(As to Count _____)

The Defendant, having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by Law, and no cause being shown,

(Check either provision if applicable)

☐ and the Court having on _____ (date) deferred imposition of sentence until this date.

☐ and the Court having placed the Defendant on probation and having subsequently revoked the Defendant's probation by separate order entered herein,

IT IS THE SENTENCE OF THE LAW that the Defendant be committed to the custody of:

XXXX The Department of Corrections of the State of Florida, or

☐ The Sheriff* of _____ County, Florida

*(Name of Local Corrections Authority to be inserted at printing if other than Sheriff)

To be imprisoned (check one; unmarked sections are inapplicable)

☐ For a term of Natural Life

XXXX For a term of NINETY NINE (99) YEARS

☐ For an indeterminate period of 6 months to _____ years.

If "split" sentence complete either of these 2 paragraphs

☐ Followed by a period of _____ on probation under the supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

☐ However, after serving a period of _____ imprisonment in _____ the balance of such sentence shall be suspended and the defendant shall be placed on probation for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

•••••• SPECIAL PROVISIONS ••••••

By appropriate notation, the following provisions apply to the sentence imposed in this section:

Firearm—3 year mandatory minimum

☐ It is further ordered that the 3 year minimum provisions of 775.087(2) are hereby imposed for the sentence specified in this count, as the defendant possessed a firearm.

Drug Trafficking—mandatory minimum

☐ It is further ordered that the _____ year minimum provisions of 893.135(1)( )( ) are hereby imposed for the sentence specified in this count.

Retention of Jurisdiction

XXX The Court pursuant to F.S. 947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for the period of 33 years. The requisite findings by the Court are set forth in a separate order or stated on the record in open court.

Habitual Offender

☐ The defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S. 775.084(4)(a). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

Jail Credit

XXX It is further ordered that the Defendant shall be allowed a total of 467 credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration (optional):

Consecutive/Concurrent

It is further ordered that the sentence imposed for this count shall run ☐ consecutive ☐ concurrent (check one) to the sentence set forth in count _____ above.

Defendant JOE HAYES

Case Number 80-156-CF-A-RMS

SENTENCE

(As to Count 4)

The Defendant, having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by Law, and no cause being shown.

(Check either provision if applicable)

☐ and the Court having on _____ (date) deferred imposition of sentence until this date.

☐ and the Court having placed the Defendant on probation and having subsequently revoked the Defendant's probation by separate order entered herein,

IT IS THE SENTENCE OF THE LAW that the Defendant be committed to the custody of:

☐ The Department of Corrections of the State of Florida, or

☐ The Sheriff* of _____ County, Florida

*(Name of Local Corrections Authority to be inserted at printing if other than Sheriff)

To be imprisoned (check one; unmarked sections are inapplicable)

☐ For a term of Natural Life

☐ For a term of _____

☐ For an indeterminate period of 6 months to _____ years.

If "split" sentence complete either of these 2 paragraphs

☐ Followed by a period of _____ on probation under the supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

☐ However, after serving a period of _____ imprisonment in _____ the balance of such sentence shall be suspended and the defendant shall be placed on probation for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

•••••• SPECIAL PROVISIONS ••••••

By appropriate notation, the following provisions apply to the sentence imposed in this section:

Firearm—3 year mandatory minimum

☐ It is further ordered that the 3 year minimum provisions of 775.087(2) are hereby imposed for the sentence specified in this count, as the defendant possessed a firearm.

Drug Trafficking—mandatory minimum

☐ It is further ordered that the _____ year minimum provisions of 893.135(1)( )( ) are hereby imposed for the sentence specified in this count.

Retention of Jurisdiction

☐ The Court pursuant to F.S. 947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for the period of _____. The requisite findings by the Court are set forth in a separate order or stated on the record in open court.

Habitual Offender

☐ The defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S. 775.084(4)(a). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

Jail Credit

☐ It is further ordered that the Defendant shall be allowed a total of _____ credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration (optional):

Consecutive/Concurrent

It is further ordered that the sentence imposed for this count shall run ☐ consecutive ☐ concurrent (check one) to the sentence set forth in count _____ above.

66

A21

Defendant JOE HAYES

Case Number 80-156-CT-A-RMS

Concurrent/Consecutive (As to other convictions)

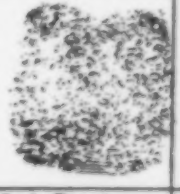
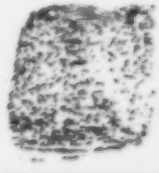
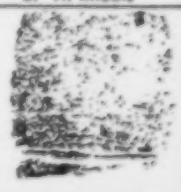
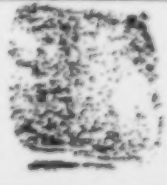
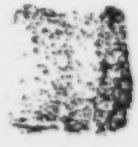
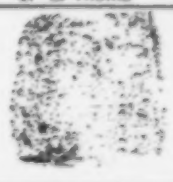
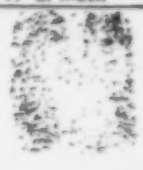
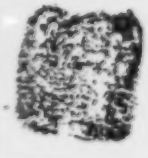
☐ It is further ordered that the composite term of all sentences imposed for the counts specified in this Order shall run ☐ consecutive or ☐ concurrent (check one) to any active sentence currently being served by the Defendant.

In the event the above sentence is to the Department of Corrections, the Sheriff of CHARLOTTE County, Florida is hereby ordered and directed to deliver the Defendant to the Department of Corrections together with a copy of this Judgement and Sentence.

The Defendant in Open Court was advised of his right to appeal from this Judgment by filing notice of appeal within thirty days from this date with the Clerk of this Court, and the Defendant[s entitlement to the assistance of counsel in taking said appeal at the expense of the State upon showin of indigency.

In imposing the above sentence, the Court further recommends (SEE ATTACHED ORDER)

FINGERPRINTS OF DEFENDANT

1. R. Thumb	2. R. Index	3. R. Middle	4. R. Ring	5. R. Little
				
6. L. Thumb	7. L. Index	8. L. Middle	9. L. Ring	10. L. Little
				

Fingerprints taken by:

LT. JOHN DAVENPORT: CHIEF JAILER-CCSO
Name and Title

DONE AND ORDERED in Open Court at CHARLOTTE County, Florida, this 5th day of OCTOBER A.D. 19 81. I HEREBY CERTIFY that the above and foregoing fingerprints are the fingerprints of the Defendant, JOE HAYES and that they were placed thereon by said Defendant in my presence in Open Court this date.

James R. Adams
CIRCUIT JUDGE
HONORABLE JAMES R. ADAMS

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR CHARLOTTE COUNTY, FLORIDA CRIMINAL ACTION

STATE OF FLORIDA,

Plaintiff,

vs. CASE NO. 80-156 CF

JOSEPH HAYES,

Defendant.

MOTION TO DISMISS

Proceedings had and testimony taken in the above entitled cause before the Honorable Richard M. Stanley, Circuit Judge, on Monday, October 20th, 1980.

APPEARANCES:

EUGENE BERRY, Esquire,
Assistant State Attorney,
Charlotte County Courthouse,
Punta Gorda, Florida 33950;
representing the Plaintiff.

ROBERT BADER, Esquire,
Post Office Box 267,
Punta Gorda, Florida 33950;
representing the Defendant.

MR. BADER: I would like to call --

MR. BERRY: Before we call any witnesses I would like to address the Court.

THE COURT: Let me get a Clerk so I know what we are talking about.

MR. BADER: Judge, the motion was filed back on the 24th of September and it's three (3) pages, a motion to dismiss or suppress evidence.

THE COURT: When was it filed?

MR. BADER: The 24th, Judge, it may have been stamped the 25th. I have it certified as the 24th.

THE COURT: Motion to dismiss information and to discharge and suppress evidence.

MR. BERRY: Your Honor, I would like to address the Court on the motion itself.

THE COURT: Yes.

MR. BERRY: Your Honor, from reading his motion it appears this motion is one, a motion to, standard motion to dismiss, also possible a C-4 motion to dismiss, also possible a motion to suppress, also possible a writ of habeas corpus. Your Honor, I think the motion is totally confusing, totally inappropriate. I don't think it puts me adequately on notice of what I'm here for today. Are we here for a suppression hearing? Are we here for a hearing on the prima facia evidence in regard to the case? Are we here on

probable cause to arrest? I don't know, your Honor. I would ask this motion be stricken and denied and would leave Counsel to file proper motion according to the rules of proccedure.

THE COURT: I'm going to deny your motion, your motion to strike, your motion to dismiss. Alright.

MR. BADER: Mr. Shoup please.

RALPH ROBERT SHOUP, JR.

A Witness herein, being first duly sworn, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. BADER:

Q. Mr. Shoup, will you give us your full name and official position?

A. Ralph Robert Shoup, Jr., Detective Sargeant, Punta Gorda Police Department.

Q. In the course of your official duties did you have occasion to investigate Joseph Hayes?

A. Yes, sir, I did.

Q. As a result of your investigation did Mr. Hayes become a suspect in a series of sexual batteries?

A. Yes, sir.

THE COURT: Hold it right there, just a minute, let

me get my -- you may proceed, gentlemen.

Q. (Mr. Bader continuing) Who assisted you in the investigation, Mr. Shoup?

A. Numerous individuals, Investigator Gandy, Chief of Police, Assistant Chief of Police, the State Attorney.

Q. You conferred with the State Attorney in the course of your investigation?

A. That's correct.

Q. Did there come a time when you caused Mr. Joseph Hayes to be arrested?

A. Yes.

Q. When was that date, sir?

A. I don't recall the date off hand; it was the latter part of June.

Q. If I told you it was June 23rd --

A. That's correct.

Q. And, how did you procure his arrest?

A. We had gathered information and probable cause to arrest Mr. Hayes on description, location, Court order to get the documents from the Care Center where he worked.

Q. You applied to this Court for an order to secure documents from a Care Center?

A. Investigator Gandy did.

Q. You were familiar with that order and the documents?

A. Yes.

Q. At any time did you apply to this Court for a warrant for the Defendants arrest?

A. No, sir.

Q. Do you know why you didn't apply to this Court for a warrant?

A. No, sir.

Q. Have you been advised that it was necessary or unnecessary?

A. No, sir.

Q. Well, in your discussion with the State Attorney were you not instructed or did you not inquire whether or not to apply to this Court for a warrant?

A. He didn't advise that we needed a Court Order.

Q. Now, you say you had probable cause to arrest him; can you tell me now what that evidence was to arrest him?

MR. BERRY: Your Honor, I'm going to object to that. We have already had a probable cause hearing in this matter. I think it's irrelevant. I believe the Court will find a first appearance sheet.

MR. BADER: That was after his arrest.

THE COURT: Objection sustained.

Q. (Mr. Bader continuing) Mr. Shoup, was there any eye witness identification that this Defendant is the perpetrator for any of the crimes that he's been charged wi

A. Before his arrest or after?

Q. Before./ No.

A. No, sir. EW ID

Q. Did any informant tell you they knew of their personal knowledge that he had perpetrated any of the alleged crimes?

A. Not myself.

Q. After his detention did you take his fingerprints?

A. Yes, sir.

Q. And, as a result of those fingerprints what action did you take?

A. He was placed under arrest.

Q. How did you arrange to take his fingerprints?

A. Volunteer basis on his behalf.

Q. How do you describe the circumstances where it was voluntary?

A. We asked if he would submit his fingerprints for elimination in some burglary cases and he acknowledged that he would and he did.

Q. Did you advise him that he was under suspicion of that crime at that time?

A. Yes.

Q. Did you advise him of his Miranda rights at that time?

A. No, we didn't ask him any questions concerning --

Q. Did you inform him of his Miranda rights?

A. No, sir, I didn't.

Q. Did anyone in your presence advise him of his Miranda rights at that time?

A. No.

Q. What prior arrangements had you made concerning the taking of his fingerprints?

A. I don't understand that question.

Q. You said you went to his — where did you go to get Mr. Hayes?

A. To his house.

Q. On June 23rd?

A. Right.

Q. And, at that time did you have intention to arrest him?

A. Yes.

Q. In other words, you had already formed the conclusio: that he was the perpetrator of these alleged burglaries and sexual batteries?

A. I had formed a belief .

Q. And, it was your intention to arrest him that night?

A. Yes.

Q. Is it not a fact when he refused to voluntarily come with you he was informed he would be arrested if he didn't come?

A. That he could be arrested, but he came voluntarily.

Q. After he was told he could be arrested?

A. It was in the conversation, but he voluntarily came to the station.

Q. Did he initially volunteer or did he say no I don't want to go?

A. He said he would go.

Q. He would go?

A. Yes, that's correct.

Q. He said he would go?

A. Yes.

Q. Before he was told that he would be arrested?

A. Yes.

Q. You remember my previously taking your deposition?

MR. BERRY: Excuse me, your Honor, is he trying impeach his own witness? I don't understand.

MR. BADER: I'm surprised by his answers, so we are going to go back and refresh his memory.

MR. BERRY: I'm going to object to this.

Q. (Mr. Bader continuing) Mr. Shoup, had the fingerprints not proven to match up with those previously taken at the scene what would you have done with Mr. Hayes that evening?

A. Took him home.

Q. Would you have apologized for inconveniencing him?

A. I would have thanked him for voluntarily coming down and giving his fingerprints.

Q. Then you would have sent him home?

A. I would have taken him home.

Q. Did you have a set of fingerprints prior to the night of June 23rd?

A. No.

Q. Had you inquired of various Federal Agencies to see if you could obtain them?

A. Yes.

MR. BADER: I have nothing further of this witness.

CROSS EXAMINATION

BY MR. BERRY:

Q. Deputy Shoup, prior to going down and talking to Mr. Hayes did you feel you had sufficient probable cause to arrest him for a felony?

A. Yes, sir.

Q. And, you say that he did come down there voluntaril

A. Yes, sir.

Q. And, did you take his fingerprints?

A. Yes, sir, I did.

Q. Did you match them up?

A. I gave them to Agent Kardell who made a poisitive identification.

Q. And, then he was formally booked in the Punta Gord

Department?

A. Yes, sir.

Q. When you were at his house, when you went up there to see him the first time, did you do any search or seizure of anything inside the house or anything of any shape or form?

A. No, he came outside.

Q. Did you ask him any incriminating questions whatsoever of any kind or nature of any type?

A. No, sir.

Q. Mr. Shoup, the fingerprints we are talking about isn't the only evidence in this case, is it?

A. No, sir.

Q. There are numerous items, is that correct?

A. That's correct.

REDIRECT EXAMINATION

BY MR. BADER:

Q. Mr. Shoup, what are the numerous items?

A. Well, we conducted a photo line-up after the arrest.

Q. That was with the picture you took at the booking proceedure?

A. That's while he was sitting in the lounge.

Q. That was after his detention and arrest?

A. Well, he had just been arrested.

Q. What evidence did you have prior to the time that you got the fingerprints and photographs?

A. We had a pair of tennis shoes.

Q. Did you have those before the arrest?

A. No.

Q. I want you to tell the Judge what evidence you had that you have told the State you had numerous items of evidence, what you had prior to his arrest?

A. I had made a composite from two (2) of the victims from their description and the composite was close to the description of Mr. Hayes, which was elimination type purpose on a composite which was enough to give us enough probable cause in that particular area that he did meet and match physical description of the suspect.

Q. Mr. Shoup, are you telling this Court that the composite you got from which of the victims?

A. Both, there was two (2) victims I got composites from.

Q. Is it your testimony to this Court that the composite you got from each victim was sufficient to conclude in your mind that Joe Hayes was the perpetrator of these offenses, just on that alone?

A. This was another piece in the puzzle.

Q. You had composites, but you want to tell the Court in your mind that composite by itself was sufficient to

identify Joe Hayes?

A. Not particularly Joe Hayes.

Q. But, any white male, slim, blonde hair?

A. Brown hair.

Q. One of the composites showed him with a mustache?

A. Yes.

Q. And, the other one without a mustache?

A. Yes.

Q. One with dark hair that came over his forehead?

A. That's correct.

Q. With light hair, shoulder length?

A. That's wrong.

Q. What did it show?

A. Brown hair -- no, it was not shoulder length, just below the ears.

Q. So that there was substantial differences between the composites?

A. I don't make the composite. I do the composite from what the victim --

Q. But, between the two (2) composites there was a difference?

A. Only the mustache.

Q. What other bit of evidence did you have prior to his arrest in addition to the composite?

A. From tHe Care Center we had documented information

as to Joe Hayes' conduct and behavior with the patients that are in the Care Center. His behavior was just another piece of the puzzle.

Q. There was evidence from the Care Center that he was a rapist?

A. No.

Q. That he had been to any of these homes on the days and nights in question?

A. No.

Q. Do you recall specifically what it was that impressed you from the Care Center report that made you think Joe was the rapist?

A. His cruel treatment towards elderly patients is what impressed me about that since most of our victims were elderly age.

Q. Any other evidence?

A. I believe that is about all that I can recall at this time.

MR. BADER: I have nothing further.

RECROSS EXAMINATION

BY MR. BERRY:

Q. I have just one quick question. You work closely with Detective Gandy?

A. That's correct.

Q. Is it true that you did work out a -- that it was

A34

there were three (3) rapes involved?

A. That's correct.

Q. They were similar in nature of what you call modus operendi?

A. Yes.

Q. Was there also a pattern designed by you as to location?

A. Yes.

Q. Was there also a pattern of house numbers and was that another piece to the puzzle in regard to Mr. Hayes?

A. We believed it was. We had the first victim was 401 Shreve Street, the second victim was 401 West Retta Esplanade Avenue, the third victim was 140 Circle Drive.

Q. Where did Mr. Hayes live?

A. He lived 421 Cross Street. He worked in the 400 block at the Care Center.

Q. Four hundred (400) block of the Care Center, so this was an item of evidence involved?

A. Right.

Q. Mr. Shoup, apart from the coincidence of the 400 series of numbers how did that effect, in your mind, that Joe Hayes on the three (3) nights in question went to the various addresses and commited any crimes?

A. Mr. Bader, I don't know how it is connected, but when we had found that he lived at 421 Cross Street it was

just, for some reason, it did seem coincidental, but it was something you think about, that 400 series.

Q. Did you submit that information to any psychiatrist or mathematician to see if it fit?

A. No.

Q. To get any rational basis for it?

A. No.

Q. Is that all the evidence that you had prior to his arrest?

A. The only other thing was what Investigator Gandy located at the residence of Mr. Hayes before he was arrested which was the tennis shoes.

Q. Okay, we'll let him testify about that. I have nothing further of this witness.

MR. BERRY: I have nothing further.

THE COURT: You may step down, sir.

MICHAEL W. GANDY

A witness herein, being first duly sworn, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. BADER:

Q. Would you tell us your full name and official posit please?

A. Michael W. Gandy, Investigator, Punta Gorda Police Department.

Q. In the course of your duties did you have occasion to investigate one Joseph Hayes?

A. Yes, sir.

Q. In connection with sexual batteries committed in the Punta Gorda area?

A. Yes, sir.

Q. You heard the testimony of Detective Shoup previously given in these proceedings?

A. Yes, sir.

Q. Prior to his arrest on June 23rd, you agree he was arrested on June 23 rd?

A. I don't know the exact date, but if you say so.

Q. You accompanied Detective Shoup on that occasion?

A. Yes, sir.

Q. And, did you inform the Defendant that he was under suspicion of the crime of burglary?

A. Yes, sir.

Q. Did you advise him that you wanted him to come down and voluntarily give his fingerprints?

A. Yes, sir.

Q. Now, in fact you weren't investigating the burglary, but you were investigating the sexual battery?

A. I was investigating a burglary, which was prior to

the battery in each case.

Q. You mean going into the house to commit the rape and made the burglary?

A. Yes, entry to commit the rape.

Q. But, each burglary was only relevant with regard to the rape that followed?

A. I don't understand the question.

Q. You separate the consequent sexual battery from the burglary and you weren't investigating the sexual battery at all this night?

A. Yes, sir, I was.

Q. You were?

A. And, the burglaries.

Q. I thought so. Alright, sir, you asked Mr. Hayes -- where was he when you went to see him that night?

A. He was at his house.

Q. Did you procure a warrant?

A. Yes, sir.

Q. Had you intention of arresting him that night?

A. Yes, sir.

Q. Had you discussed the matter of procuring a warrant with your superiors or the State Attorney?

A. No.

Q. You had conferred with your superiors prior to going out there?

A. Yes, sir.

Q. By pre-arrangement you had a Sheriff's Deputy to compare fingerprints?

A. Yes, sir, their expert.

Q. That was Detective Kardell?

A. Yes, sir.

Q. He was to stand by so that when you got fingerprints you could compare?

A. He was to be notified when and if Mr. Hayes was brought to the station to come down to and compare the prints. We checked to see that he would be available.

Q. You went out to his house -- did you speak with Joe Hayes?

A. Yes, sir.

Q. Was Joe Hayes asked to come down and voluntarily give his prints?

A. Yes, sir.

Q. Did he accept that offer?

A. In my opinion he did, he said "No problem, I have nothing to hide" at first, when I first asked him.

Q. That's true, that's what he said, "I haven't done anything. I have nothing to hide." and what was said after that?

A. By --

Q. Do you recall previously testifying that you said

"Joe, how about if we arrest you for burglary?" or "We are going to arrest you" and then Joe said, "No, don't do that, I would rather come down and give fingerprints."?

A. I did not advise him that I would arrest him, that was Investigator Shoup, I don't recall the words. This was after bits of conversation, I don't recall the exact content of the information, which Joe had started to back pedal is a good word, out of coming down to the station, and then Investigator Shoup or Detective Sgt. Shoup advised him that again something "How about if we arrest you?" or "We will then arrest you". Joe then blurted out "No, no, I don't want to do that. I will come voluntarily."

Q. Okay, you heard Detective Shoup testify that he never made that statement?

A. Which statement?

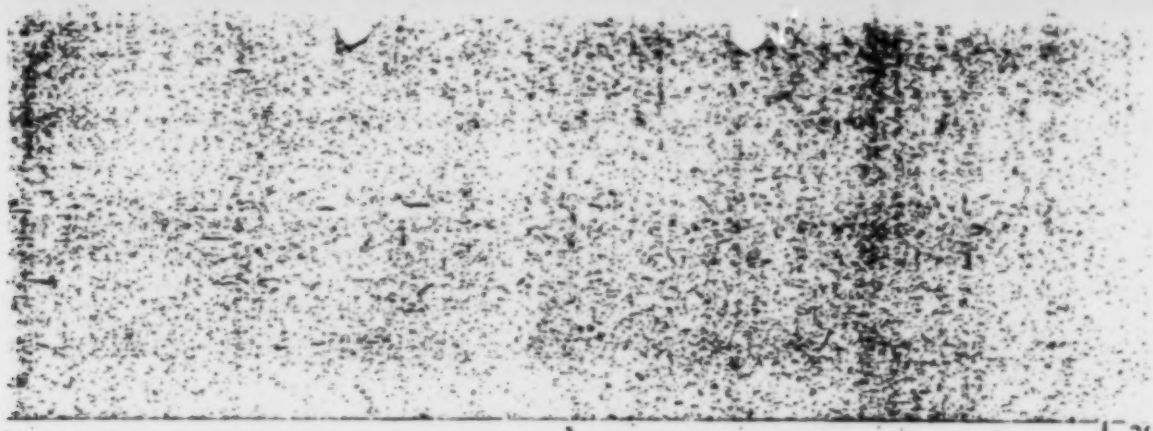
Q. That he told Joe, when Joe started back pedaling, that if you don't come we'll arrest you?

A. No, I didn't hear him say that.

Q. You did hear Investigator Shoup tell Him "If you don't come we'll arrest you"?

A. He didn't say it that way. He didn't tell Joe -- he made the statement, something to the effect he would be arrested or that he was going to be arrested, but he didn't threaten and say it in a threatening manner to make him come to the station.

A4



Q. Alright, Mr. Gandy, other than the investigation following his arrest, what evidence did you have substantiating Joe Hayes identity as the perpetrator on three (3) sexual batteries?

A. Prior to his arrest?

Q. Yes, prior.

A. Joe Hayes, we had done, myself and Detective Shoup, had done numerous fingerprint checks with different subjects that Officers and us run into. I was called at my house while I was at home --

Q. Let me slow you down a minute. Did any of the victims identify Joe Hayes?

A. I was told they did, yes, sir.

Q. Prior to his arrest?

A. Not prior to his arrest.

Q. I'm speaking of only prior to his arrest?

A. Not that I know of.

Q. Did any informant tell you that he had seen Joe Hayes leaving any of the victims premises on the night in question?

A. No, sir.

Q. Was it necessary for you to tie up his fingerprints to the latent you got at the scene in order to satisfy you that he was indeed the perpetrator of these offenses?

A. Not to satisfy me, no, sir.

Q. Well, you are saying that you had sufficient evidence before you got the fingerprints to cause his arrest for these crimes, all three (3) of them?

A. Yes, sir, to satisfy me. I didn't say all three (3) at the time.

Q. What evidence did you have? I assume you had the same evidence that Mr. Shoup had?

A. Yes, sir.

Q. Four (4) street numbers?

A. Yes, sir, all victims were assulted from the rear. I spoke with a friend.

Q. Assuming that is true --

MR. BERRY: Excuse me, I would ask that he be allowed to answer.

THE COURT: Allow him to answer.

A. Would you ask me again?

Q. (Mr. Bader continuing) Assuming all the victims had been attacked from the rear, how did that connect with Joe Hayes prior to his arrest or even afterwards?

A. He had a friend or girlfriend he was dating that he had tried to have sexual intercourse, according to her, from the rear, on many occasions.

Q. This was a sworn statement you got from somebody?

A. No, sir, an interview.

Q. And, this girl you knew?

A'

A. I didn't know personally, no, sir.

Q. I see, and that circumstance was sufficient to identify Joe Hayes as the perpetrator?

A. No, sir, not that one alone.

Q. What other circumstances did you have?

A. Again, the same as Detective Sgt. related with the 400 series and it was his bazaar behavior described by the Care Center, his apparent dislike of older female employees with the Care Center. His apparent, as described by one of the Care Center employees, his apparent dislike or his apparent fear of younger women. She had described this to me, one of the employees had. The fact that I saw a pair of herring bone design tennis shoes on his porch and that at the rape scenes there was a pair of herring bone shoe prints in all the cases. The fact that --

Q. Let's stop there a minute. These herring bone design tennis shoes, are they unique in any way?

A. No, there's a lot of them out.

Q. How many would you guess?

A. I have no idea.

Q. Hundreds?

A. I would imagine.

Q. So, there was nothing about herring bone tennis shoes that would necessarily connect Joe Hayes as the perpetrator of the particular night in question of these

offenses?

A. Just the fact that he had a pair and that was the type of print we found at each scene.

Q. Mr. Gandy, are we talking about a suspicion, putting all these things together you had formed a suspicion h e might be the perpetrator?

A. It was at first when it first started, but at the end I was convinced.

Q. That was after you got the fingerprints?

A. Before.

Q. Did it ever occur to you then, if you were convinced, to bring that before the Judge and ask for an arrest warrant?

A. No, sir.

Q. Did you have any reason to believe Joe Hayes was leaving town?

A. No, sir.

Q. Are you familiar with the requirement to seek from the Court a warrant for arrest when you believe there has been a crime committed by a citizen, do you know about that procedure?

A. Which one?

Q. To come before a Judge and ask him to issue a warrant to arrest somebody?

A. If I had probable cause I can make the arrest without

a warrant.

Q. I see, but do you know about the proceedure about coming before a Judge even with —

A. Do I know how to do it?

Q. Yes.

A. Yes.

Q. Do you know why you didn't do it in this case?

A. No, sir.

Q. Have you had a chance to know why you didn't come?

A. No, sir.

MR. BADER: I have nothing further of this witness.

MR. BERRY: No questions.

THE COURT: You may step down.

(Witness excused)

MR. BADER: Judge, I have a litany of Florida and Supreme Court case ruling to suppress the evidence and the requirement is to obtain from the Courts a warrant before arrest. I would not burden the Court with the complete recitation of them. There are a few Florida cases that I think are important that I would like to call to the Court's attention.

One is Supreme Court Florida decision, Anderson vs. State, which is cited, your Honor, 241 So.2d.

THE COURT: You got copies of it?

MR. BADER: I sure do. The pertenent paragraph is at headnote 7, your Honor.

THE COURT: 241 So.2d, 390?

MR. BADER: Headnote paragraph 7 is the one that cites with approval the authority that I will ultimately get to.

THE COURT: Okay.

MR. BADER: I would cite, your Honor, Shepherd vs. State at 343, So.2d, page 1390. Here the First District Court of Florida states that a warrantless search must be based on probable cause and on sufficient circumstances to excuse the failure to obtain a warrant. I have marked the pertinent parts of the decision for your Honor's review.

THE COURT: Wait just one second.

(off the record)

THE COURT: I might point out where I went. I got a copy, which you furnished me of Anderson vs. State.

MR. BADER: That's the only paragraph, Judge.

THE COURT: But, it doesn't include everything in the case. There are other parts that go into that case.

MR. BADER: Well, that's the only part --

THE COURT: Yes, sir, but I like to look. I want to know what circumstances it is, what and why. Why not just bring me the one paragraph?

MR. BADER: When I finish my argument it will be

connected. I could have brought only the part the Supreme Court of Florida recognized, the doctrine of Davis vs. Mississippi case and it has been upheld and cited with approv by other Florida Courts and then I'll get to the Kensler vs. Florida, your Honor, 360, Southern Reporter at page 24. The Second District, which is our Appelate Division cites with approval and dismisses and reverses a conviction based upon fingerprints taken by the Police where they were taken before he was arrested and without probable cause, violating his First Amendment protection and cites again Davis vs. Mississippi and the Anderson case.

That's all I'm doing, is what they get down to say is what the Supreme Court said in the Davis vs. Mississippi case, which I cite to your Honor as being 394, United States 721, a decision in which the Supreme Court of Mississippi confirming a conviction based on fingerprints taken from a negro male, rape of an older woman, were suppressed. The conviction was reversed and the fingerprints suppressed by the Supreme Court. It is this decision that Anderson acknowledged, the Supreme Court of Florida, in which this District Court of Appeals cites with approval in the Kensler case. That was the only reason I cited Anderson and Kensler.

It is the Davis case, that is the pertinent one, Judge. I would also cite to you the decision of the Fourth District

State of Florida vs. Hinton, 305, Southern Reporter page 804, which states that in a warrantless search the burden, once the fact the search was warrantless, shifts to the State and the Defendant need do nothing more but assert the warrantlessness of the search. And, in that case neither the State nor the Defendant put on any testimony, but merely referred to the Court file, which failed to disclose that a warrant had been obtained. In the absence of having obtained a warrant the Court said that the burden shifts to the State to prove that the arrest or search were valid and that the evidence, not having done so, the motion was granted.

I give that to you, your Honor.

Again, in the First District Court, cited Shepherd vs. State, 343, So.2d, 1349, warrantless search must be based on probable cause and on sufficient exigent circumstances to excuse the failure to obtain a warrant. And, in that case the Court, speaking very specifically to the kind of facts we have in this case, the burden rests on the State to demonstrate that the warrantless search of the person -- that a warrantless search must be based on probable cause and on sufficient exigent circumstances to excuse the failure to obtain a warrant. Even if the Officer had probable cause to believe evidence of a crime was contained in the billfold, this was a search of a billfo

and there was no exigent circumstances to excuse the Officer for applying for a search warrant. Even if it was sufficient to justify, if the evidence was sufficient to justify the issuance of a warrant, nothing excused the Officer from the requirement of waiting to conduct the search until the warrant issued.

So that what the Courts have consistently, from our Florida Court to the Supreme Court, as that if the State in the development of it's investigation developes sufficient evidence to warrant the arrest of the Defendant, it must apply first to the Court where an objective, impartial Officer will have an opportunity to review the evidence and put his judicial approval on the act of the Police, otherwise the Fourth Amendment becomes meaningless, if each Officer can make up his own mind as to what is probable cause, then we don't need warrants, we don't need Chapter 301 or the Fourth Amendment, because every Officer will decide that he has got probable cause. The test is whether an impartial judicial officer would agree with them. And, here I think the evidence clearly shows that they had a lot of suspicions, but they needed those fingerprints, but they went to Joe's house and had the intent as their deposition shows, which are on file in this record, they were going to arrest him that night one way or the other for these crimes without ever coming before you, in violation

of Four (4), Six (6), and Fourteenth (14) Amendment to the Constitution as more fully set forth in the Davis case.

THE COURT: What say the State?

MR. BERRY: I believe the facts presented before the Court sufficiently show the Officers had probable cause for the Defendant prior to the taking of fingerprints. I think that, further, the evidence before this Court is what he did, voluntarily go down there, they took his fingerprints and arrested him, there was no total facts before the Court. There was absolutely no search of any dwelling involved. They said they didn't even go in. What we are talking about is probable cause to arrest on a felony. The law of Florida clearly states if an Officer had probable cause to arrest on a felony he has that authority. I think they properly exercised their authority. They did not secure a search warrant. They weren't searching any building or personal effects. I think that the motion as filed before the Court should be denied.

THE COURT: Alright, on the basis of the testimony before the Court the motion incorporated all portions thereof is denied. So be it.

(Hearing concluded)

STATE OF FLORIDA)

COUNTY OF CHARLOTTE)

I, Patricia L. Shankland, Deputy Official Court Reporter, in and for the 20th Judicial Circuit of the State of Florida, do hereby certify that I recorded by shorthand the proceedings had and testimony taken in the above-styled cause; and the foregoing typewritten pages, numbered 1 to 29, inclusive, are a true and correct transcript of my shorthand notes taken at the time and place herein set forth.

IN WITNESS WHEREOF, I have hereunto set my hand this 10th day of November, 1980.

Patricia L. Shankland

Patricia L. Shankland,
Notary Public, State of
Florida at Large.

My commission expires:
2-27-84

civil
EL 6 PAGE 20

(5)

ORIGINAL

Supreme Court, U.S.
FILED
AUG 13 1984
ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-6766

JOE HAYES, PETITIONER

V.

STATE OF FLORIDA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE FLORIDA DISTRICT COURT OF APPEAL
FOR THE SECOND DISTRICT

APPENDIX

(1)

13712

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR CHARLOTTE COUNTY, FLORIDA CRIMINAL ACTION

STATE OF FLORIDA,

Plaintiff,

vs. Case No. 80-156-CF-A-RMS

JOSEPH HAYES,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Before the Honorable Judge James Adams, Judge of said Court, at the trial of the above-styled action held in the LaBelle County Courthouse, LaBelle, Florida, commencing at 9:30 A.M., Wednesday, July 8, 1981.

APPEARANCES:

EUGENE C. BERRY, Assistant State Attorney, Charlotte County Courthouse, Punta Gorda, Florida 33950; representing the Plaintiff.

ROBERT M. BADER, Attorney at Law, Post Office Box 267, Punta Gorda, Florida 33950; representing the Defendant.

INDEX

STATE WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
JULIANNE HOLLANDER				
Direct by Mr. Berry	2			
Cross by Mr. Bader		20		
Redirect by Mr. Berry			134	
Recross by Mr. Bader				136
LAURA HOLLANDER				
Direct by Mr. Berry	138			
Cross by Mr. Bader		140		
GAIL HOLLANDER				
Direct by Mr. Berry	145			
Cross by Mr. Bader		148		

E X H I B I T S

NUMBER	MARKED FOR ID	ADMITTED
STATE EXHIBITS		
1 A-J	17	
2	133	135
DEFENSE EXHIBITS		
1	49	
2	49	
3	49	
4	66	
5	125	
Composite 6	127	

(Voir Dire was had on Tuesday, July 7th, 1981, and was not transcribed.)

(Whereupon, the second day of trial resumed at 9:30 A.M., and opening statements were had and were not transcribed.)

MR. BERRY: Your Honor, the State will call Julianne Hollander.

Whereupon,

JULIANNE HOLLANDER,

a witness, produced for and in behalf of the State of Florida, having been first duly sworn by the Clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BERRY:

Q Would you state your full name, please, ma'am?

A Julianne Hollander.

Q Mrs. Hollander, I can't hear you, and I'm sure they can't.

Would you state your full name, please?

A Julianne Hollander.

Q Mrs. Hollander, where do you live, ma'am?

A I live at 401 West Retta Esplanade, Punta Gorda, Florida.

Q And is that located in Charlotte County, Florida?

A Yes, it is.

Q How long haveyou lived at that address?
A Ten and a half years.
Q And were you living at that address back on May 12th and May 13th of 1980?
A Yes.
Q Mrs. Hollander, how old are you?
A I'm 51.
Q What's your date of birth?
A September 30th, 1929.
Q Mrs. Hollander, would you describe your house to me, please?
A My house is an old house in the center of town with a large porch on two sides, two-story house, there are two bedrooms downstairs, living room, kitchen, bathroom, and three bedrooms upstairs.
Q And is that your dwelling, is that where -- is that your place of abode?
A Yes.
Q You live there?
A Yes.
Q Sleep there?
A Yes.
Q Cook there, eat there?
A Um-hmm (affirmative).
Q It's your home?

A Yes.

Q And was it your home back on May 12th and May 13th of 1980?

A Yes.

Q Back on May 12th and May 13th of 1980, who, if anyone, was living there with you?

A My two daughters.

Q And what are their names, please?

A Gail and Laura.

Q And how old are they?

A Now, or then?

Q Then, now.

A Now Gail is -- Gail is now 27; Laura is now 19.

Q So they would have been 18 and 26 a year ago?

A Right.

Q They were living there with you at the time?

A Yes.

Q I now direct your attention to the evening of May 12th, 1980.

Did you retire that evening to bed?

A Yes.

Q First of all, Mrs. Hollander, let me ask you this; are you employed?

A Yes, I am.

Q Where do you work at?

A I work for the First National Bank in Punta Gorda.
Q And in what capacity?
A At that time I was a teller. Now I'm a new accounts clerk.
Q How long have you worked at the bank, all together?
A All right -- umm, fifteen months.
Q You were employed at the bank at that time in May of 1980?
A Yes. I had not been there quite two months.
Q Okay. All right, now getting back on track, I direct your attention back to the evening of May 12th, 1980.
Did you retire and go to bed that evening?
A Yes, I did.
Q About what time did you go to bed?
A About 11:30.
Q Was there anyone home at the time you went to bed?
A My older daughter, Gail.
Q And, now, where is your bedroom, you have previously testified there's two bedrooms downstairs and one or two upstairs?
A Three.
Q Three upstairs. All right.
Where is your bedroom in relation to the house?
A My bedroom is downstairs, right off the living

room.

Q How about Gail, where --

A My older daughter, Gail, sleeps upstairs.

Q And you went to bed about 11:30 in the evening?

A Yes.

Q Where was Gail when you went to bed?

A We both went to bed at the same time.

Q Now, you mentioned you had another daughter, Laura?

A Yes.

Q Was she home at the time you went to bed?

A No, she wasn't. She was out.

Q She was out for the evening?

A Yes.

Q Now, describe your front door to me, if you would, please.

A My front -- my front door is an old door with a large window in it, and at the time it had -- it's old and the lock is old, and all we had to lock it with was a skeleton key.

Q Did you have a screen door there, too?

A There is a screen door.

Q And at that time did you normally lock that front door with one of your daughters still out?

A We weren't locking the door. Mainly we left it open for ventilation.

Q Okay. This was in May of 1980, was it a little hot then?

A It was hot and we were not air conditioned.

Q You don't have air conditioning in the house?

A We have air conditioning, we're not using it.

Q So at that time you were using -- you'd leave the front door open, just close the screen door; am I correct, there, for ventilation?

A Um-hmm (affirmative).

Q And is that the door -- is there a porch outside there?

A Yes.

Q Now, you testified that you went to bed about 11:30 at night and that your older daughter Gail went to bed upstairs; is that correct?

A Yes. We said goodnight to each other at the bottom of the steps.

Q And Laura was out for the evening?

A Yes.

Q Did you have the occasion to be awakened at approximately 2:30 A.M. on May 13th?

A Yes.

Q Okay. Would you tell us what awoke you and your thoughts?

A Well, I was -- I was sound asleep, and --

Q Excuse me, could you speak a little bit louder, please?

A I was sound asleep and something began to disturb my sleep. Of course, at first, I didn't know what it was, but as I came to consciousness, I realized that something was touching my side. I was lying on my right side, and I had a sensation of something touching my left side.

Q All right. Now, if you would stop for just one moment there, you said you were lying on your right side?

A Yes.

Q Is there a door that comes into your bedroom?

A Yes.

Q From the hallway?

A Yes.

Q Would your back have been towards the door or would your stomach have been towards the door?

A My back was towards the door.

Q All right. You say you're lying on your right side and something was touching you. Please continue.

A As I became more fully conscious, in my mind I thought it was my daughter, that she had arrived home and had something she wanted to tell me. So I raised up on my right arm and turned to look and saw somebody, and realized instantly that it wasn't my daughter.

Q Did that somebody say anything?

A Yes.

Q What?

A It was a man, and he said, "I want to feel your cunt."

Q Did he threaten you in any way?

A Before I could react at all, he grabbed my free right arm and clamped his other hand over my mouth.

Q Did he say anything else?

A Yes. Then he pushed me on the bed with himself on top of me, behind me, with his hand clamped over my mouth, he said, "One scream out of you, lady, and you're dead."

Q Now, you were -- at that point were you lying on your stomach?

A Yes.

Q And he was on top of you, behind you?

A Yes.

Q What occurred next, if anything?

A He -- umm -- he -- umm-- ran his hand over my body and he penetrated my vagina with his penis.

Q How were you dressed at the time before he got there?

A I had on a nightgown.

Q Did you have on anything underneath it?

A No.

Q Now, you say he penetrated your vagina, what did he penetrate it with?

A His penis.

Q Could you feel it going in your vagina?

A Yes.

Q Was there a -- could you feel any ejaculation?

A No. He shortly after that he withdrew and then he again felt around and felt the rectal area and I knew -- I knew what he had in mind, and it was the only time that I spoke, I said, "Please don't do that."

Q Did he answer you?

A No. I -- I could tell that that was the wrong thing to have said. Then he began to attack me anally.

Q How did he attack you anally?

A He penetrated the rectal area with his penis.

Q Did he do that with your permission?

A No.

Q Did he penetrate your vaginal area with your permission?

A No.

Q Were you frightened at the time?

A I was terrified.

Q What happened next?

A It seemed like an eternity, he continued to attack

me for quite awhile, and then he withdrew and he prepared to leave.

Q Excuse me, let me stop you right there.

Mrs. Hollander, you have children?

A Yes.

Q I'm sure that you know about in regards to sexual intercourse, ejaculation, what that means?

A Yes.

Q At any time did you ever feel the sensation or any feeling or any substance on you of ejaculation?

A No.

Q Now --

A He had been drinking.

Q Could you smell the odor of alcohol about him?

A Yes.

Q Now, I think you said that he then started to leave, please explain that.

A As he started to leave, he said, "Wait a few minutes before you call the police," or something to that effect. And he got up to leave and he forgot, evidently, that there are steps inside of my bedroom, and he stumbled. I heard him stumble, and he fell against the door. I heard the door slam with him inside the bedroom.

Q Okay. Now, the door slammed with him inside the bedroom?

A Yes.

Q Is that correct, closed, is that what you're saying?

A Yes. Yes.

Q All right. What happened next?

A Well, I turned towards the doorway --

Q Did you look at him?

A Yes. As he stood there, he stood there for a few seconds dazed, and then he opened the door and left.

Q Okay. Do you know how he left your house?

A He went out the front door. I heard the screen door slam.

Q What did you do then?

A I went to my bedroom window and peered out through the blinds.

Q Does that window have a view out to the front of your house?

A Yes. Well, to the side street.

Q Did you see him after he got outside?

A Yes, I saw him as he hit the bottom step as he walked across the yard to the sidewalk and ran down the sidewalk.

Q In what direction did he go from your house?

A He went south.

Q South.

Would you describe this individual for me?

A He was tall, slender, short hair; he -- my description of his voice was that he didn't have an accent to me, he didn't have a southern accent, or --

Q About how tall would you say he was?

A Between 5'10" and 6 foot.

Q When you say "slender", what do you mean by that?

A Well, about 160 pounds, about 160 pounds.

Q You said "short hair", do you mean normal hair, or how would you describe that?

A Well, about like yours.

Q Is that man here in the courtroom today?

A I believe he is.

Q Would you point him out, please?

A He's sitting next to Mr. Bader. (Indicating.)

Q Are you pointing to the gentleman right here? (Indicating.)

A No, sir.

Q Are you pointing to this gentleman right here? (Indicating.)

A Yes, sir.

MR. BERRY: We'd ask the record to reflect that she has identified the defendant, Your Honor.

THE COURT: Let the record so reflect.

///

BY MR. BERRY: (continuing)

Q Prior to that night, did you know him?

A No.

Q Had you ever given him permission to enter your home?

A No.

Q To your knowledge, the entire time that you've been living in that house, I think you said you'd lived there approximately ten years?

A Yes.

Q Which would have been about nine years before that, to your knowledge, had that man ever been in your house prior to that night?

A No, sir.

Q Now, after he left, what did you do next?

A My first reaction was to awaken my daughters. We had been negligent about locking our doors, and I wanted to shock them enough that we would change our habit so that something like this would not happen again or happen to them. I went into my younger daughter's bedroom and I awakened her.

Q That would be Laura?

A Laura. She -- her bedroom is on the first floor. I awakened her and I told her -- asked her to come with me. We went upstairs to my older daughter's room, Gail, and we

awakened her. They knew that there was something wrong, they were afraid there'd been a death, and I told them what had happened. It was they who -- well, I knew that I should call the police, but it was they who insisted.

Q Did youwant to call the police, you, in the beginning?

A I was not going to call the police.

Q Were you ashamed?

A I was just thankful that it was over. That I had survived. That it had not been my daughters. As long as I had survived, I just -- I guess I just wanted to be done with it.

Q Did you call the police?

A Yes.

Q Did they come?

A Yes.

Q Did the officers take you to the hospital, one of the officers?

A Yes.

Q Were you examined?

A Yes.

Q Was there any -- did you have any physical -- anything wrong with you physically?

A No.

Q Were you in any pain?

A Not at that time, no.

Q Did some develop later?

A I was uncomfortable and afterwards for about a week I had some discomfort. I wasn't able to sit down very well. There was a little bleeding.

Q From where?

A The rectal area.

Q Is that where your discomfort, pain was coming from?

A Yes.

MR. BERRY: May I have just one moment, Your Honor?

THE COURT: Sure.

MR. BERRY: Your Honor, at this time we'd ask that this be marked State's Exhibit Number 1 A, B, C, D, E, F, G, H, I and J for identification purposes only.

THE COURT: Very well. So be it.

MR. BADER: (Indicating.)

(Whereupon, the following bench conference was conducted out of the hearing of the jury as follows.)

MR. BADER: If these are going to be used in the testimony, I will object to them as --

THE COURT: They're being marked for I.D. Go ahead and see what he's going to do next.

MR. BADER: But I'm afraid he's going to use them, and you might not know, but I know he is, and I want to make sure.

THE COURT: I'm the one making the ruling. They will be marked for I.D.

MR. BADER: I have no objection to that, but I want to be sure I can get my motion in before --

THE COURT: You will get your motion in.

MR. BADER: Okay.

(Whereupon, the bench conference was concluded and the following further proceedings were conducted within the hearing and presence of the jury.)

(Whereupon, State Exhibit Number 1 A, B, C, D, E, F, G, H, I, and J were marked for identification purposes only.)

BY MR. BERRY: (continuing)

Q Mrs. Hollander, I show you what's been marked as State's Exhibit Number 1-A for identification purposes --

MR. BADER: Your Honor, please, I'm going to object to the use of the exhibits marked for identification.

THE COURT: Objection overruled at this point.

Go ahead, Mr. Berry.

MR. BERRY: Thank you, Your Honor.

BY MR. BERRY: (continuing)

Q I show you what's been marked State's Exhibit

Number 1-A for identification purposes only.

Do you recognize that photograph?

A (Examining.) Yes, sir.

Q What does that represent?

A That's the front door of my house.

Q I show you what's been marked State's Exhibit Number 1-B for identification purposes only.

Do you recognize that photograph?

A (Examining.) Yes, sir, that's the picture of the inside of the front door of my house.

Q I show you what's been marked State's Exhibit Number 1-C for identification purposes only.

Do you recognize that photograph?

A (Examining.) Yes, sir, that's the door between the living room and the hallway. Also would be where the upstairs stairway.

Q I show you what's been marked State's Exhibit Number 1-D for identification purposes only.

Do you recognize that photograph?

A (Examining.) That's a picture of the doorway looking into my bedroom.

Q I show you what's been marked State's Exhibit Number 1-E for identification purposes only.

Do you recognize that photograph?

A (Examining.) Yes, that's a picture of my

bedroom taken from the doorway, outside of the bedroom.

Q I show you what's been marked State's Exhibit Number 1-F for identification purposes only.

Do you recognize that photograph?

A (Examining.) Yes. It's a picture of the steps inside my bedroom.

Q I show you what's been previously marked State's Exhibit Number 1-G for identification purposes only.

Do you recognize that photograph?

A (Examining.) That's a picture from inside the bedroom of the door going out of the bedroom.

Q I show you what's been previously marked State's Exhibit Number 1-H for identification purposes only.

Do you recognize that photograph?

A (Examining.) That's a picture of the steps inside the bedroom from the inside view.

Q Okay. I show you what's been previously marked State's Exhibit Number 1-I for identification purposes only.

Do you recognize that photograph?

A (Examining.) Um-hmm (affirmative), it's a picture of the bedroom inside. Beside the bed.

Q Do you recognize the window in the photograph?

A Yes, sir.

Q Is that the window to the outside?

A Yes.

Q I show you what's been previously marked State's Exhibit Number 1-J for identification purposes only.

Do you recognize that photograph?

A (Examining.) Yes, it's a picture of the bed.

MR. BERRY: Cross examine.

THE COURT: Let's take a ten-minute recess before we start this.

While you're gone, do not discuss the case among yourselves nor allow anyone to discuss it with you and arrive at no conclusions at this point.

(Whereupon, a short recess was taken.)

(Whereupon, the jury returned to the courtroom, and the following further proceedings were conducted.)

MR. BERRY: Cross examine.

MR. BADER: You're done? Oh, I didn't realize that.

CROSS EXAMINATION

BY MR. BADER:

Q Mrs. Hollander, you and I are not strangers, are we?

A No.

Q We were not acquainted before this case, however, were we?

A I had met you.

Q Yes, in some social or business affair, association

with your former husband, but we had never socialized?

A No.

Q Or I had never visited your home or anything prior to this case?

A No.

Q And since this case came about, there have been a number of occasions where I have visited and talked with you, haven't there?

A Yes.

Q The first occasion, do you recall that, ma'am?

A You came to my home.

Q Could you recall when that was in relation to this case?

A Well, it was before last October, before the first trial was set -- supposed to be. It was sometime in the summer. I don't remember what month.

Q All right. The alleged offense took place in May, and the case was first coming to trial in October, and you believe I was at your home sometime in --

A In between there.

Q In between. All right. Do you remember what the occasion was and the circumstances of that visit to your home?

MR. BERRY: Your Honor, at this time may we approach the bench?

(Whereupon, the following bench conference was conducted out of the hearing of the jury as follows.)

MR. BERRY: Your Honor, I would simply like to make the statement in defense counsel's presence that this is a civilian witness and I cannot be responsible for anything that she might say in response to his questions in regards to some of the pre-trial things that might be prejudicial against the defendant. The prior trial did not go any further -- I do not see any problem with that, but --

THE COURT: What is this prior trial business?

MR. BADER: Other than -- other than the one that we had --

MR. BERRY: The numerous times the defense counsel has spoke with her, and all I'm saying, Your Honor, is I can't be responsible for what her responses are to Mr. Bader's questions. If it might turn out to be prejudicial to the defendant, I just want to put that on the record.

THE COURT: Okay.

(Whereupon, the bench conference was concluded and the following further proceedings were conducted within the hearing and presence of the jury.)

BY MR. BADER: (continuing)

Q Mrs. Hollander, can you recall the circumstances

that brought me to your home?

A You came, without, you know, prior knowledge on my part that you were coming. You came to see the house.

Q Okay.

A You said.

Q All right. And when I came, you told the jury that I didn't call in advance, and didn't make a prior arrangement with you, do you know whether or not I had tried to call, tried to make arrangements with you?

MR. BERRY: Your Honor, I'm going to object. I think this is irrelevant and immaterial to the case before the Court.

THE COURT: No relevance. Sustained.

BY MR. BADER: (continuing)

Q Ma'am, when I came -- can you recall the hour of the day?

A It was in the afternoon.

Q Do you remember what day of the week it was?

A A Saturday.

Q Were you at home?

A I was at home.

Q And was anybody with me?

A Your wife.

Q And did I introduce to you or introduce myself to you?

A Yes.

Q And did I tell you who I was and why I was there?

A Yes.

Q And did I introduce my wife?

A Yes.

Q And did I explain why I had her present?

A No.

Q And did you invite us into your home?

A I let you come in. I can't say I invited you, exactly.

Q Well, did you --

A I suppose the fact that I let you in means I invited you in.

Q All right. And can you recall what the subject matter of our discussion was?

A The trial.

Q And that was the broad subject, I told you that I was there in my capacity as the lawyer of Joe Hayes?

A You said that it was necessary for you to see the location where the attack occurred.

Q Okay. I told you I was there, I think my question was that I was there for the express purpose of representing Joe Hayes in his defense on the charges in which you were the principal witness, did I not?

A I wouldn't say that you stated it quite that way,

you were much more friendly and much more relaxed, and you didn't come on in a very official way.

Q Okay. But the important thing that I want you to tell the jury is that did you know what my purpose was, that I was there as a lawyer for Joe Hayes?

A Yes.

Q And you did invite my wife and I in, was anybody else at home at the time?

A No.

Q Now, do you recall -- when I asked you if you recall what the subject matter of the discussion was, you said it was about the trial.

Did I ask you specific details and questions concerning what happened on the night of May 12th or May 13th?

A Yes, I believe you did.

Q Did I ask you to tell me again or to tell me for the first time exactly what occurred?

A Yes.

Q As you remembered it that night?

A Yes.

Q And didyou give me those answers?

A Yes.

Q Was not our conversation a purely voluntary and unrehearsed conversation?

A Yes.

Q Did I in any way intimidate or threaten you?

A No.

Q Did I ask to see the bedroom?

A Yes.

Q And didyou show me the bedroom where the events took place?

A Yes.

Q And did you explain to me the sequence of events as you recalled them?

A Yes. I'm sure I did.

Q And do you recall whether or not I asked you if you were able to give a -- give a description of the assailant?

A I'm sure you asked me that. I can't remember every question that you asked, but I'm sure you would have asked that.

Q Can you recall what you were able to tell me about in response to that question?

A I gave you description that I gave Mr. Berry.

Q What description did you give, ma'am?

A It was height, build.

Q Well, what was his height?

A Well, between 5'10" and 6'.

Q Yes, ma'am.

A Slender.

Q Let me ask you where or how you make your judgment that he was between 5'10" and 6 feet; that's a difference of two inches.

A I was judging him by my husband's height. My husband is heavier, so since this man was more slender, I knew he was at least the same height as my husband, 5'10", he looked taller because he was slender. So I knew it was somewhere in between there. I judged him by my husband's height.

Q I, of course, have no idea what your husband's height is, or was, when did you have an opportunity to see him at a fully extended position so that you could measure or evaluate his height?

A When he was standing at the closed bedroom door before he left.

Q That was the time that you saw him -- how long would you think that was that you saw him on that occasion?

A I suppose it was a few seconds. It seemed like -- seemed like a long time.

Q Was the room light like it is here now?

A No.

Q. Was it totally dark?

A There were no lights in the room. There was probably a little light coming from the windows. The walls

are painted white, so you can see a silhouette against the wall pretty well.

Q Okay. That's the same second, isn't it, Mrs. Hollander, the same second that you're telling this jury you saw him long enough to measure his height, the same second you told this jury Mr. Berry's question that he stumbled when he left your bed; isn't it?

A He stumbled and he fell and --

Q And he stumbled and --

MR. BERRY: Your Honor, I'm going to object. He's got to allow the answer before he hits her with another --

THE WITNESS: I said he stumbled and --

THE COURT: Let the witness answer.

MR. BADER: Yes, sir, but I would like to be allowed my freedom to cross examine this witness without being interrupted. I did not interrupt, Counsel.

THE COURT: You will be allowed so much freedom you will be appalled, but you will let the witness answer.

MR. BADER: Thank you, sir.

BY MR. BADER: (continuing)

Q Now, Mrs. Hollander, you told the jury when Mr. Berry asked you that you were over on your belly, he was behind you, when he got up he stumbled and you turned and

looked; is that right?

A When -- as he --

Q Is that correct, is that what you told the jury?

A When he stumbled, he didn't fall to his knees, he stumbled on the steps, he was still in an upright position. He landed against the door and was standing there for a second before he opened the door.

Q And that's when you saw him?

A Yes.

Q That's the second that you saw him?

A It was a few seconds, he was dazed from the fall.

Q Well, do you think it was three seconds, four seconds?

A I don't know. It wasn't a minute.

Q Against that door, which is down the stairs, and it's in a little alcove; isn't it?

A It's not in an alcove, it's right --

Q But it is an alcove, isn't it?

A The head of my bed is right there, it's not an alcove, it's directly to the bed.

Q But the area where the door opens up and the stairs go down is an alcove, isn't it?

A I call an alcove an enclosed area. It's not enclosed.

Q No, it's not enclosed, except on three sides,

isn't it?

A It's not enclosed on three sides, there's two open sides.

Q Mrs. Hollander, there's two open sides?

A The door, and it's open to the room.

Q The door closes it off, the wall closes it off --

A Doesn't close it from my view at all.

Q Oh, no, I'm not saying it's closed from your view, I'm suggesting that it is a darkened corner, an alcove of the bedroom, and it's a lower level, isn't it?

A It's as low as this (indicating). It's not that low.

Q It's like two or three steps down, isn't it?

A Two steps.

Q Two steps. And as he stumbled and you heard that, and he didn't stumble in an upright position -- in a fall-down position, is that right? You're sure of that detail, that he didn't stumble down on his knees?

A I know that he was standing at the door. No, he didn't fall down on his knees. He just stumbled as you would if you missed a stair, and he caught himself on the door. He caught his balance and that made the door close.

Q And in that second, all that commotion was going on, you glanced over and you saw and you said, "Oh, he's as tall as my husband, give or take an inch or two"; is that

what you're telling this jury?

A Yes.

Q All right. Now, of course we don't know how tall Mr. Hollander was, but you've told us that he was 5'10", and that this man was between 5'10" and 6 feet, and the way you measured that was by seeing him lean against this door before he went out the door right after he had ravished you anally and vaginally?

A Yes.

Q And when did you make a note or refer to his height that you obtained at this moment; did you write it down right away that evening?

A I was taken to the police station and made a statement that evening.

Q Yes, but you weren't taken to the police station for hours later.

Did you after you saw him and realized he was about 5'10" to 6 feet tall, did you make a note anywhere in an effort to fix in your mind what this person was and what he looked like?

A I wouldn't have to write it down. I have it in my mind.

Q I see. And in your mind as this man left your bedroom after ravishing you, according to your testimony both anally and vaginally, that you rolled over and you made

a mental note as he went staggering out the door that he was 5'10" to 5'6" (sic); is that right?

A I had a mental picture. I know I've seen my husband stand at that door many times, it wasn't something I deliberately decided to make a mental note, I just remember things.

Q All right. You also told Mr. Berry that that person was slender, and I assume you're making that comparison with your husband again?

A I saw him. I know a slender person when I see a slender person.

Q All right. You're saying that slender in your mind is what you know when you see a slender person; is that correct?

A To me he was slender. You're not slender, he's slender.

Q I see. Would I be slender if I were compared with Lt. Rudy over there, (indicating), Rudy Jager?

A I don't know him.

Q Rudy, would you stand up, I want to get some perspective for the jury.

Am I slender compared to Lt. Jager?

A If I had to do a comparison, I don't know. I would probably say to somebody you were a little thinner than he, I wouldn't call you slender.

Q Well, between us, I'm the more slender; am I not?

A I might say that.

Q All right. So slender is something that's in your mind. That's slender.

How did you arrive at about a hundred sixty, sixty-five pounds; you told the jury that, how did you come to that number?

A Again, I guess I was judging by my husband's weight.

Q You did that at the same time that you were measuring his height as he was going out of your room?

A You get a mental picture of somebody and you have an idea of what they look like.

Q All right. So you had a mental picture of somebody between six-ten (sic)and -- 5'10" and 6 foot, about a hundred and sixty to a hundred sixty-five pounds; is that right?

A That's what I would have guessed.

Q All right. Is that what you told the police a few days later?

A It wasn't a few days later, it was that same night.

Q The very same night you told the police, right?

A That morning, I guess.

Q Okay. Can you remember what you told me that afternoon, that Saturday afternoon in your house?

A I probably told you the same thing.

Q When I asked you, Mrs. Hollander, if you could describe the defendant, did you tell me what he looked like and yes, you could describe him?

A I don't recall really what I said to you that day. I would have told you the same thing I would have told the police.

Q Would you have?

A Yes.

Q Did I ask you if you knew what color his eyes were?

A You have asked me that and I have told you I don't know the color of his eyes.

Q Did I ask you if you knew the shape of his nose?

A You may have asked me that. I don't know.

Q Do you know the shape of his nose from what you saw that night?

A No. I didn't remember.

Q Do you know the shape of his mouth?

A No.

Q Do you know whether or not his teeth were regular or missing or discolored or had any dentures or anything on?

A No.

Q You never saw his teeth, did you?
A No.
Q Never saw his mouth, did you?
A I probably saw his mouth. I don't remember.
Q What do you mean "I probably saw his mouth"?
A Well, I saw his face, so --
Q When did you see his face?
A I saw -- when he was beside my bed. He was -- when I turned and saw somebody beside my bed. I saw, you know, his face in the dusky room. I couldn't see the color of his eyes.
Q Couldn't see any of his features, either, could you? Could you?
A Not his features, I could see, you know, an outline of his head.
Q In other words, all you really know about the person that was in your room that night is that he was slender, by your definition, between 5'10" and 6 foot, as compared to your husband?
A That's what I would have judged him at.
Q Yes, and that he was Caucasian; is that correct?
A Yes.
Q You knew he wasn't a Negroid?
A No.
Q Did you know whether he was Hispanic?

A I didn't think so, no.

Q But you couldn't tell, could you?

A I would not have described him as Hispanic.

Q But you wouldn't know, you were sure that he wasn't Negroid?

A Yes.

Q How were you sure that he wasn't black?

A Because he didn't sound black. He didn't -- his skin wasn't black, his skin was white.

Q You could see his skin, couldn't you?

A Um-hmm (Affirmative). If he had been a black person, he would have been a very light black person.

Q Have you ever seen black people who were so light that you could almost -- could think they were white?

A A few.

Q I think you told the jury that he had a normal voice; is that right?

A Yes. In my description he did not have a southern accent, and he didn't have any accent that I recognized. So to me, from the middle west, I felt he had a midwestern voice.

Q And all of those are the total of what it is that you saw on the night of May 13th upon which you are predicating your ability to make an identification; is that right, is there anything else?

Is that correct, Mrs. Hollander, yes or no; you got to do for me just like you did for Counsel. I'd ask the Court to instruct you to give me an audible answer.

A Would you please ask that again?

Q No, I won't.

MR. BADER: Leslie, would you repeat it for the lady.

(Whereupon, the question was read back by the reporter as follows:

"Question: And all of those are the total of what it is that you saw on the night of May 13th upon which you are predicating your ability to make an identification; is that right?")

THE WITNESS: Yes, I guess. Yes.

BY MR. BADER: (continuing)

Q Is your answer "yes" that's the total of what you're basing your identification on?

A On what I saw.

Q That night we just described, if there's anything else, I want you to tell the jury now what it is that you saw or heard or observed on the night in question.

A I saw him once more from the window.

Q Okay. Tell that to the jury, now, what did you see from the window?

A I saw him run down the street past the window.

I mean, again, I got another look at his height, his build --

Q And that was from out of your bedroom window as he passed on the street in front of you?

A Yes.

Q While he was running?

A Yes.

Q And you made a mental measurement against the one that you had made earlier as he stumbled out of your room that he again looked 5'10" to 5'12" and a hundred and sixty pounds; is that correct?

A Yes.

Q Is there anything else, Mrs. Hollander?

A No, I don't believe so.

Q Well, maybe I can help you.

Did you following the events you've described to this jury assist a police officer from Punta Gorda in creating a picture or drawing of what the assailant looked like to you?

A Yes. Put together a composite.

Q That occurred where and when, ma'am?

A A few days later, I think, yes, a few days later.

Q At your house?

A At my house, um-hmm (affirmative).

Q And the police officer came to your house; didn't he?

A Yes.

Q Do you remember that officer's name?

A Yes. Detective Shoup.

Q And when he came, did he have a composite already prepared?

A No.

Q He didn't have one based upon his interview with you?

A He had -- no, I'm sure he prepared it there. He just, you know, put together a few things. He said, "Does this look like the man?" And then I said, made a change, and because he had too much hair on the first one that he put together --

Q Where did he have too much hair?

A On his head. He had, you know, like an afro-style almost. Looked like -- I said his hair was much shorter, so he changed it.

Q And did you assist him in picking out the other features of the face?

A No, I don't believe so. I think it was -- I don't believe there was much of anything else other than the hair was the only thing that I contributed.

Q Well, now, was there only one picture made?

A I don't understand what you mean only one picture.

Q Well, did you make only one composite for the

detective at your home that day?

A Yes.

Q Only one?

A Yes. We didn't make -- no, he wouldn't make more than one.

Q Is it your testimony you only made one?

That's what I want to get at, what did you do?

A First he made one and I said, "No, that's not right."

So he changed the hair, and I said, "That looks more like him."

Q All right. Now, the hair that you're referring to is the hair on top of his head?

A Yes.

Q And you're telling us that the first picture that he made was --

MR. BERRY: Your Honor, could --

THE COURT: Approach the bench.

(Whereupon, the following bench conference was conducted out of the hearing of the jury as follows.)

THE COURT: I'm going to do it right now: Quit flashing that thing in front of the jury. It's not in evidence. Quit flashing it in front of the jury.

(Whereupon, the bench conference was concluded and the following further proceedings were conducted within the

hearing and presence of the jury.)

BY MR. BADER: (continuing)

Q Now, pictures you made had hair that was like an afro, you said?

A Not that I made.

Q Well, the detective?

A The first one that the detective put together, the hair, you know, there was too much hair.

Q Well, I want you to tell the jury how the detective picked out that hair?

A He didn't, he just was putting some things together, then he said, "Does this look like him?" And that's when I said, "No, too much hair."

So he went into his little kit and he pulled out some other, you know, how they put together with these film things, they put on top, and he changed it.

Q Well, you are correct, I do know how they do it, but I'm not sure the jury does.

Where does he get the information about what to pick and what to pull?

A Where does the detective get the information?

Q Yes.

A Well, they have kits and they have general features that they put together and they get the -- hopefully the description from you, from the person describing.

Q All right. Then it was you who told the detective what your assailant looked like, that he used parts to put together, didn't he?

A He knew that I didn't have a good picture of his, you know, as I said, his nose and that, so he had a face put together, and as I say with the hair already -- he had a composite together when he came, or put it together -- put it together right there at my table, but before I looked at it, and then, you know, I told him how it differed from my picture.

Q Well, now, Mrs. Hollander, that wasn't the first time you had talked to this detective, was it?

A No, of course not.

Q You had talked to him before, hadn't you?

A He was at my home that night that this occurred.

Q And did you talk to him after that?

A This was only a day or two after, I don't -- I don't remember if I talked to him. I went down one day, and the next day I went that evening and made a statement, to another officer, I went the next day and had fingerprints taken, I don't remember when he did it, I don't remember who did it.

Q But you had told the police everything that you knew about the case prior to the time that the detective came to draw this picture?

A I tried to give them a full statement that evening when it was fresh in my mind. I don't remember giving them any other statement.

Q And on that occasion that you went and saw the police, when was that?

A You mean when I first went for fingerprints?

Q I don't know what you did, Mrs. Hollander, you're the one who's telling the story, and I don't know if you went for fingerprints first or the statement first.

A No, I had the statement first, on the way home from the hospital, we stopped at the police station and I made a statement.

Q Let me back up a moment.

I asked you if your identification of Mr. Hayes in this courtroom, what it was based upon, you told me, told the jury, that he was tall and slender and that he was white, that he had a normal voice, or at least he didn't have a southern accent. That's all you knew about him. You told us how you arrived at his height and his weight. I have asked you if there was any other way that you could have determined the description sufficient to point your finger, you knew you were going to be asked can you and will you stand and point to Mr. Hayes; or didn't you?

A I thought I would have to identify him, yes.

Q Yes, and before you came into this courtroom

whether it was yesterday or last week or last month or in the past year, you spoke with the prosecutor and he's asked you can you and will you stand or look and point at Mr. Hayes; hasn't he?

A He hasn't asked me that directly, no.

Q He hasn't asked you that question at all?

A No.

Q He has never said to you, Mrs. Hollander, can you identify Joe Hayes?

A He never asked me that directly.

Q What did he do, how did he get around --

A I've had very little discussion with him.

Q But when I took your deposition last year, you talked to him the day before the deposition, didn't you?

A We didn't talk -- discuss the case really, he just told me not to worry that he'd be there. We did not discuss the case or what I should say.

Q Mrs. Hollander, is it your testimony to this jury that the State of Florida represented by Mr. Berry or any of the Assistant State Attorneys has never asked you in so many words can you and will you identify and point your finger at this man and say that that is the man that was in my room on May 13th?

Is that what you're telling us?

A They have never said that directly to me.

Q Did you ever say to them that, "Yes, I can," did you volunteer it?

A I said that I hoped when I got into court that I would be able to identify him from my memory.

Q And from what else, ma'am?

A Just from what I remember. From what I -- from what I saw.

Q From what you saw where and when, ma'am?

A In my room.

Q Just what you saw in your room on the night in question?

A Right. That's the only time I've seen him.

Q That's the only time you've seen Joe Hayes?

A Yes.

Q Is that your testimony to this jury?

A Well, I saw him briefly --

Q Not just -- let me ask my questions.

Is your testimony to this jury that except at 2:30 in the morning on May 13th, 1980, some fourteen months ago, that you have never seen Joe Hayes until you came into this courtroom this morning?

A I saw him briefly in May when we were to have the other trial.

Q Where did you see him briefly in May?

A When he was in the courtroom.

Q Where was he sitting?

A At the counselors' table.

Q With me?

A Yes.

Q When you say "briefly", Mrs. Hollander, what do you mean "briefly"?

A Because I wasn't there very long.

Q Well, were you there five minutes?

A No, a couple of hours.

Q A couple of hours.

That's briefly?

A Well, I just didn't look at him very much.

Q You didn't look at him very much. Only two hours.

You and your daughters, Julie (sic) and Gail sat in the back of the courtroom and watched Mr. Hayes and me and the Judge and the court proceedings, didn't you?

A I was there for awhile, yes.

Q You were there when the Court began, weren't you?

A Um-hmm (affirmative).

Q And you were there when the Court ended, weren't you?

A No.

Q You left before Court ended?

A Yes.

Q Before the noon recess?

A I left at the noon recess.

Q Yes, you left at the noon recess.

And the Court began at 9:00 or 9:30, didn't it?

A I don't remember what time you came in.

Q And you stayed until 12:00 noon, until the Judge recessed the proceedings. That's the brief time that you watched Joe Hayes, isn't it?

A Well, I didn't really watch him very much.

Q I see.

A I saw him, but that was the only time.

Q Now, ma'am, let me help you some more; do you read the newspapers?

A Yes.

Q Do you read the Fort Myers News Press?

A Yes.

Q And the Punta Gorda Herald News?

A Yes.

Q You have previously told me that, haven't you?

A Yes.

Q And you read them every day, don't you?

A Yes, most every day.

Q You're a literate and educated woman, aren't you?

A I guess so.

Q And you have read all the newspaper accounts of this case, haven't you?

A I've read quite a few.

Q And you have saved them, haven't you?

A I have some of them, um-hmm (affirmative).

Q You've kept them at home?

A (No audible response.)

Q I can't tell when you shake your head what your answer is.

A Yes.

Q And did some of those newspaper accounts carry photographs of Mr. Hayes?

A Yes.

Q And did you read them?

A Yes.

Q And look at them?

A Yes.

Q I show you what's been identified by the Clerk as a News Press for Wednesday, May 13th --

MR. BERRY: Mr. Bader, are you having that marked for identification purposes?

MR. BADER: Yes.

MR. BERRY: Thank you. May I see it first? (Examining.)

THE CLERK: What are these to be marked?

MR. BERRY: I have no idea.

THE CLERK: I'd like to be informed.

MR. BADER: What?

THE CLERK: Do you want these as Defendant's Exhibits?

MR. BADER: Yes, ma'am, Defendant's Exhibits 1, 2, 3, whatever order I give them to you.

(Whereupon, Defendant's Exhibits Number 1, 2, 3 were marked for identification purposes only.)

BY MR. BADER: (continuing)

Q I show you what's been marked as Defendant's Exhibit 1 for identification and ask you if you've ever seen it before.

A (Examining.) Yes.

Q Does that have a picture of Joe Hayes in it?

A Yes, on the back.

Q Did you read that paper?

A Yes.

Q I show you Defendant's Exhibit Number 2 for identification and ask you --

THE COURT: Mr. Bader, please don't exhibit those to the jury. They're not in evidence. You're continuing to do this, this is the second time. You did that awhile ago. Watch that.

MR. BADER: I'm sorry.

THE COURT: Nobody wants to have to try this thing over again.

MR. BADER: No, sir.

BY MR. BADER: (continuing)

Q Did you read that paper?

A No.

Q Does it have a picture of Joe Hayes on it?

A It does.

Q Do you recognize the picture?

A I've never seen it before.

Q But do you recognize the picture?

MR. BERRY: Your Honor, I'm going to object to this line of questioning. If this is for the purpose of identification, she's answered that she doesn't know, that she's never seen it.

THE COURT: Objection be sustained.

BY MR. BADER: (continuing)

Q Exhibit 3 for identification.

A (Examining.) Um-hmm, I saw this.

Q You saw that, does it contain a picture of Joe Hayes?

A Yes, it does.

Q Thank you, ma'am.

When was the first picture of Joe Hayes that you saw?

A The first time I ever saw a picture?

Q Yes, ma'am.

MR. BERRY: Your Honor, at this point I'm going to object, are these being put into evidence or are they being placed for identification and stopped there.

MR. BADER: At this point that's all I'm doing. If I may be allowed to go through with my cross examination, it's very difficult, Judge, and I've got a hostile witness, and I'd like not to be interrupted.

THE COURT: You've got an adverse witness, she's not a hostile witness. They have been exhibited to the jury, however, I'm specifically instructing the jury to disregard any pictures that you may have seen in the hands of the defense attorney. They have no place at this point. They may have later, but not at this point.

MR. BADER: Leslie, read it back.

(Whereupon, the last question and answer were read back by the Reporter as follows:

"Question: When was the first picture of Joe Hayes that you saw?

Answer: The first time I ever saw a picture?

Question: Yes, ma'am.")

BY MR. BADER: (continuing)

Q Would you answer, please?

A Shortly after Mr. Hayes was arrested. The police officers brought some pictures to my house, it was a lineup

of six or seven people.

Q All right. Let me stop you at that point.

Can you put a date on that occasion?

A If I had my calender here I could. It was in June, about six weeks after the attack. I believe. I don't remember the exact date.

Q What was the date of the attack?

A May 13th.

Q And you think it was approximately six weeks after that?

A Yes. I think it was the day after he was arrested, I'm not certain of the date.

Q Okay. Did you see the newspaper account of his arrest that day?

A That day, no.

Q The day after he was arrested?

A I'm sure I did, because it was after the police officers had been there.

Q Well, I don't know whether it was or not, but did you read the newspaper --

MR. BERRY: Your Honor, I'm going to object to Mr. Bader testifying. He's asked her a question, and she's answered, and he comes back and says, "I don't know whether it was or not."

That's not proper for him to do. He can ask her

the questions and she can answer them.

THE COURT: Objection be sustained. Counsel cannot testify.

MR. BADER: No, sir, I apologize. I really didn't think I was testifying, I was trying to get my thoughts in order, but I understand the State's anxiety, and I apologize for thinking out loud and trying to frame my questions.

BY MR. BADER: (continuing)

Q Mrs. Hollander, did you read the newspaper account of Mr. Hayes' arrest the first day it appeared in the newspaper?

A The first -- I don't know the day he was arrested. You know, I didn't know it that day, I didn't know it until the next day, so I don't know whether it was the first day it was printed or not.

Q Whether or not if it was the second day?

A Well, I did read about his arrest in the paper.

Q Yes, you did, and you saw the pictures in the paper that was published with that story?

A If there was a picture. I don't remember.

Q You don't remember?

A No, I really don't.

Q Whether you saw a picture of the alleged person shown to be arrested.

Did you read the account of his arrest?

A I'm sure I did.

Q In which paper?

A I don't know.

Q Which papers did you read that day?

A I mean, I just don't know which paper it came out in. I read the two papers. So whatever was in the two papers, I read.

Q In the Fort Myers News Press and the Punta Gorda Herald News?

A Um-hum (affirmative).

Q You read them every day?

A Unless the Herald News isn't delivered.

Q And you did read those accounts and you saw the pictures if, indeed, there were pictures with those accounts?

A I read the papers, so whatever was there I read and I saw.

Q All right. Now, if you remember, the question was what other opportunities have you had to see the defendant before you made your identification in court today, have you ever seen the defendant under circumstances similar -- similar to those that occurred on the night of May 13th?

A No.

Q You have never seen the defendant in a darkened room against a wall in the split few seconds, you have never

been taken any place and shown Mr. Hayes in a darkened room and all he did was let you open the door and look at him in the dark, near as you can describe it to the way it was the night in question, and then take you away and say, "Now give me a description of him"?

A No.

Q Or identify him?

A No.

Q Have you ever been taken anywhere at any time by anybody and shown any other six-foot-ten or twelve (sic) slender, white, Caucasian individual to see if they looked like the person that you said you saw on May 13th in your bedroom?

A No.

Q Have you ever been taken at any time anywhere by the police in an effort to determine your ability to identify this defendant as the person you saw in your room?

A No.

Q Is the only evidence of his identification to your knowledge, your personal knowledge, that few seconds as he left your room and again that few seconds as he ran by in the street outside your bedroom window?

A I'm afraid I lost part of the track.

Q Do you.

A Is that the only time --

Q Did you lose track of what I'm saying?

A I'm sorry, I -- I don't --

Q Is that what the problem is, you lose track of what I'm saying, or do you lose track of what the answer has to be?

A No, sir. I just don't know whether there is more. The police did bring pictures for me to look at to pick out from the lineup.

Q I didn't ask you that.

A All right. That's what I wanted to know, whether that was the question.

Q Do you know the question?

A Have I seen him any other time?

Q In any other circumstance or any other person.

A Or any other person? I don't understand that part.

Q Are you confused, Mrs. Hollander?

A This question has me confused. Would you please ask it again?

MR. BADER: Yes, I'll be very happy to. Leslie, will you go back and find my precise question and ask her again?

(Whereupon, the question was read back by the Reporter as follows:

"Question: Is the only evidence of his identifi

cation to your knowledge, your personal knowledge, that few seconds as he left your room and again that few seconds as he ran by in the street outside your bedroom window?")

THE WITNESS: All right. The first part, the only evidence of his identification, and I'm thinking of the pictures, now that I'm excluding those, no. I mean, that was part of the identification, looking at the pictures that the police have.

BY MR. BADER: (continuing)

Q In other words, you're saying that your identification in the courtroom today is based upon pictures brought to you by the policemen; is that right?

A Was partly from the pictures that I identified this was the person, and they said that was the person they had arrested.

Q You are relying upon pictures brought to you by the police?

A No. I'm not.

Q Did you take those pictures?

A I'm not relying on that.

Q. Did you take those pictures?

A No.

Q Do you know whether those pictures are representations of Joe Hayes or not?

Did you know Joe Hayes beforehand?

A No.

Q Did you have any idea what he looked like before the night of the 12th, the 13th?

A No.

Q But your identification today is in addition to the statements made by you of his description in the room and the pictures of the officer that brought with him to you, that's what you're basing your identification on?

A On what I saw that night.

Q And what the policeman brought to you and showed you; is that right?

A And on the pictures that I identified.

Q That the policeman brought to you?

A Yes.

Q After you read the story in the newspaper, correct?

A I don't know whether it was after or before.

Q You don't know.

A I think it was the same day.

Q I think it was. I think it was.

MR. BERRY: Your Honor, I'm going to object one more time of his trying to testify.

THE COURT: Sustained. Counsel cannot testify.

///

BY MR. BADER: (continuing)

Q You told the jury, whether it was Mr. Berry's or my question, that you went to the police and gave them a statement; is that correct?

A Yes.

Q Did you sign that statement?

A Yes.

Q Do you recall how many pages the statement was?

A I think it was three.

Q Can you recall whether it was a statement you wrote out in longhand or a statement that was transcribed on a tape recorder and later typed up?

A It was on a tape recorder and typed later, typed up and I signed it the next day.

Q And did you read it over?

A Yes.

Q Have you, other than the day you read it and signed it, have you read it any time since then?

A No, I've never seen it again.

Q Well, now, that's not exactly correct, is it, Mrs. Hollander? Didn't you see it with me in the courthouse in Punta Gorda?

A I don't believe I looked at the statement that day.

Q Didn't I have you identify it, show it to you?

A I didn't read it. I identified my signature at the bottom, was that right?

Q But you didn't read the statement?

A I didn't sit there and read it through.

Q Did you read it the day before in Mr. Berry's office?

A No, I did not.

Q Were you in Mr. Berry's office the day before?

A I was in his office.

Q Because you knew you had been subpoenaed to give your deposition to me on behalf of Mr. Hayes, hadn't you?

A That's right.

Q You went down and visited with Mr. Berry, didn't you?

A Yes.

Q And he didn't give you a copy of your statement to help you?

A He did not.

Q And you have never seen it even to this day?

A I have not read it again, no.

Q You have never read it again?

A No.

Q Have you done anything to help refresh your memory concerning the details of the night of May 12th, the morning of May 13th?

A I have gone over it in my mind.

Q Did you go over the newspaper articles and the pictures?

A No, sir.

Q You didn't do that?

A No, I didn't.

Q You have never gone over them?

A In the year and a half I may have looked at them, I did not look at them before this trial.

Q Did you look at them before the trial back in May?

A No, I didn't.

Q Of this year?

A No. I have tried to refresh my memory just by thinking about it so that I would have things in order in my mind. I know what happened, I know what I had to say to give it in order.

Q What did you know you had to say?

A I had to tell them what happened that night. I had to remember what he said, and I thought about it in the evenings before the trial so that I would be able to recall it and retell it.

Q Mrs. Hollander, tell this jury whether or not in your opinion your memory was better on the day or two after the alleged rape and your memory today?

A I don't know whether my memory is better now or

then. I try to remember as well and as accurately as I can.

Q Mrs. Hollander, do you believe that your memory is as good today as it was the day or two after the rape?

A (No audible response.)

Q Is that what you want the jury to believe, that it doesn't make any difference?

A I think I would -- I think I remember it as well.

Q You think you do? Did you ever come face to face with this defendant?

A Not until today.

Q You were face to face with him in the courtroom in Punta Gorda six weeks ago?

A No, I was sitting behind him. I saw him from behind. I have not been face to face with him before.

Q You saw his pictures before, face to face, once you identified and said that you --

A The one, the police pictures, that's true.

Q And the newspaper pictures?

A They were not -- most of them were from the side or from the rear.

Q Well, isn't that the way you saw him?

A I saw his face. I saw him head-on when he was beside the bed. I saw the shape of his head directly on.

Q When he was crouching down by your bed you saw him head-on?

A Yes.

Q Was that when he was leaning up and rubbing your body?

A (No audible response.)

Q Mrs. Hollander?

A Yes.

Q And you awoke; is that right?

A Yes.

Q And you had this funny sensation, didn't you?

A I turned and expected to see my daughter.

Q Because your daughter used to come into your room and rub your body and --

A No.

Q -- wake you up?

A Sometimes if she had something she wanted to tell me, she'd been out, I thought she had something she wanted to tell me, she would come in and shake me.

Q Shake you on your leg, rubbing it up and down?

A No, but I didn't know what was happening at the time I awoke. I had been asleep.

Q You were sound asleep is what you told the jury?

A I was -- I was sound asleep.

Q You were over on your right side, weren't you? (Demonstrating.)

A I was on my right side.

Q And you leaned up on your right elbow, didn't you? (Demonstrating.)

A That's right.

Q On your elbow, and you looked over your left shoulder? (Demonstrating.)

A Um-hmm (affirmative).

Q In the dark, out of a sound sleep, Mrs. Hollander?

A Um-hmm (affirmative).

Q Expecting to see your daughter?

A That's right.

Q But you saw somebody else's face that you didn't recognize?

A That's right.

Q And you heard a voice that you didn't know, what did that voice tell you?

A I knew when I heard a man's voice that there was a stranger in my room, and my instinct told me what was about to happen.

Q What did your instinct tell you?

A That there would only be one reason to have a strange man in your room crouched beside your bed.

Q Didn't you think it might be your husband, Mrs. Hollander?

A It wasn't my husband's voice, it wasn't his shape. I would recognize my husband even in the dark.

Q And you screamed?

A No.

Q You didn't scream?

A No.

Q What did you do?

A There wasn't much time to do anything.

Q Why didn't you scream, Mrs. Hollander?

A I wouldn't have screamed. I didn't want to arouse my daughter.

Q In that split second you looked and made all of these determinations and decided that, "I won't scream because if I do that will arouse my daughters"?

A I didn't really have time to think about it, but it wouldn't have done any good in my house to scream, anyhow, my daughter upstairs couldn't possibly have heard anything. It's too far away.

Q You thought of all of that while you were laying there?

A You think of a lot. Have you ever drowned? You think of a lot. Things are racing through your mind rapidly.

Q But you didn't scream, didn't shout out for help?

A There wasn't anybody to call for help, and I didn't want -- I wouldn't have wanted my younger daughter to come running, anyhow.

Q That's what you thought of that moment, "I don't

want my daughters here, let him rape me, but I don't want help, I don't want anyone to call for the police"?

A They wouldn't have heard me.

Q You decided that they wouldn't hear you?

A I knew they wouldn't. They're hard enough to wake up.

Q You think a screech in the night by you would have gotten no relief and no assistance from anybody?

A I don't believe I would have been heard. I don't think I could have. I didn't have time, anyhow, because he immediately clamped his hand over my mouth and threatened me, told me not to scream.

Q Mrs. Hollander, you have told this jury that you came up on your right elbow and looked over at the head and face of your assailant; is that correct?

A That's right.

MR. BADER: Would you mark this, please, as Exhibit 3 for identification?

THE CLERK: Four.

MR. BADER: Four. Thank you.

(Whereupon, Defendant's Exhibit Number 4 was marked for identification purposes only.)

BY MR. BADER: (continuing)

Q Do you have a present recollection of what you told the police officer when you gave him your statement?

A You mean the whole statement?

Q Not word for word, but what you told him.

A Well, I told him what I told here when Mr. Berry told me to describe what happened.

Q I'll ask you to look at what's been marked as Exhibit 4 for identification. I'll show you that it consists of three typewritten pages that you have previously described as the statement you made.

I ask if you'll look at the bottom of each page and tell me if your signature appears thereon.

A (Examining.) Un-hmm (affirmative).

Q Have you seen that statement before, and is that your signature?

A Yes.

Q All right. I would direct your attention to the last two lines --

MR. BERRY: Your Honor, I'm going to object at this point. He's offered that for identification purposes only. She's identified it. If he now introduces it into evidence, if not, I'm going to object to anything in it at this point.

THE COURT: At this point all he's done is direct her attention to the last two lines. I don't know how much further we'll go beyond that.

THE WITNESS: (Examining.) Yes, sir.

BY MR. BADER: (continuing)

Q I direct your attention to the last two lines --

A Um-hmm (affirmative).

Q Have you had an opportunity to read them?

A Um-hmm (affirmative).

Q May I have it, please?

I'll ask you now, Mrs. Hollander, did you ever come face to face with Joseph Hayes on the night of May 13th -- May 12th this last year?

A I know what that says, I was -- at the time I gave that statement I was thinking of it in a different context, that I did not come face to face with him during the actual attack. He always attacked from the rear, but I wasn't referring to when I turned -- when I turned on my right elbow and turned and looked and saw that it wasn't my daughter's head.

Q I ask you to tell me where in the two lines that you just read it explains what you have just told --

MR. BERRY: Your Honor, I'm going to object.

BY MR. BADER: (continuing)

Q If it does --

MR. BERRY: He's trying to go into something that has not been introduced into evidence. If he wants to introduce that into evidence, he knows how to make the proper motion.

THE COURT: Sustained.

BY MR. BADER: (continuing)

Q Now, I'll ask you did you make that explanation to the police officer when you made this statement?

A I didn't. If I made any other explanation it would be in there, I guess.

Q Did you tell the police officer, "I never came face to face with my assailant"?

A During the attack.

Q I didn't ask you that question. I know what you're trying to say now --

A Well --

Q I'm asking you if on the day or two following the assail (sic) -- the alleged rape, did you tell the police officers, "I never came face to face with my assailant"?

A (No audible response.)

Q Just yes or no.

A (No audible response.)

Q Did you tell that to the police officer?

A (No audible response.)

Q Is it so hard to say yes, Mrs. Hollander?

MR. BERRY: Your Honor, he could ask her the question, I don't think he's got a right to comment on her answers.

THE WITNESS: I said that in the statement.

BY MR. BADER: (continuing)

Q That "I never saw the assailant face to face"?

A That is what I said in the statement.

Q Thank you, Mrs. Hollander.

Mrs. Hollander, how was your assailant dressed that night?

A Shirt, pants.

Q What kind of shirt did he have on?

A I don't know.

Q Well, comparing it with her husband, what kind of shirt did he have on?

A I don't know.

Q What kind of pants did he have on?

A I don't know that, either.

Q You have no recollection of the kind of shirt or pants that he had on?

A No.

Q You wouldn't know whether the shirt had buttons or was a slipover, you wouldn't know whether the pants were denim or khaki, or sports pants or long pants or short pants?

A No.

Q Did you ever see the sexual organs of your assailant?

A No.

Q You told the jury that his first words were, "Be

quiet", and that his first actions were to feel your body.

What was it he told you he wanted to do?

A His first words were, "I want to feel your cunt."

Q Did he?

A Yes.

Q How did he feel your cunt, Mrs. Hollander?

A With his hand.

Q With his hand.

Can you tell me what you mean he felt it with his hand? Can you describe for this jury what conduct made you believe his hand was on your cunt?

A Well, you certainly can tell a man's hand. He had grabbed my right arm with his right arm --

Q He had your right arm, we know he was behind you, wasn't he, and on top of you?

A That's right.

Q Not face to face, but --

A Yes, that's what I meant, not face to face.

Q He was on top of you, from your back, and you were lying in your bed; isn't that correct?

A That's right.

Q With your cunt to the bed, Mrs. Hollander?

A Yes.

Q And his right hand around your right arm, Mrs. Hollander?

A It was his right hand that was over my mouth.

Q His right hand was over your mouth as you lay on the bed?

A His left arm grabbed my left arm.

Q He grabbed your left arm with his left arm?

A Then he --

Q Then he what, ma'am?

A That's when he pinned me down with his weight on top of mine.

Q Yes, ma'am.

A My right arm was then pinned under me.

Q Your right arm was now pinned under you, he let loose of your right arm?

A He didn't have ahold of my right arm, he had his hand on my mouth.

Q On your mouth?

A His left arm had ahold of my left arm.

Q Yes, ma'am.

A He had my right arm pinned under my body. Then he released my left arm, with hisweight was able to hold me down, and with his left hand free now is what he felt my body with.

Q How did he feel your body?

A (No audible response.)

Q What did he do?

A He explored my body with his hand. He touched my

breasts, he ran his hand up and down my side. His hand, his --

Q His left hand. He released your left arm and he was now exploring under -- between the bed and your body, and felt your breasts, is that right?

A That's right.

Q How long did he feel your breasts?

A Not very long. He was impatient.

Q Where was his right arm at this point?

A I don't know.

Q Did he ever turn loose of your mouth?

A Yes. At some point he did.

Q Then after he felt your breasts, what did he do with your breasts, Mrs. Hollander?

A Nothing. He just touched it.

Q Well, were you able to tell -- did he touch it with his fingertips, did he touch the nipple, did he massage it, did he grab it, did he squeeze it, what did he do?

A He just very quickly touched it. He really didn't know what he was doing.

Q He didn't know what he was doing.

A He just, you know, he was very frantic, impatient, he was very tense.

Q You could tell all of that?

A His heart was beating rapidly, hard, I could feel

it against my back.

Q And then where did his hand go after it briefly touched your breasts?

A Well, I told you that he penetrated the vagina with his penis.

Q No, ma'am, we're not talking about his penis now. We're talking about his hand.

A Well, that's probably where his hand went.

Q You said that he touched your cunt, and I want you to tell me how and when and what he did that lets you tell this jury that that is what you know he did.

THE COURT: We will be in recess until 1:24. While you are gone, do not discuss the case among yourselves, allow no one to discuss it with you, arrive at no conclusion.

Arrangements have been made for you to be guests of Charlotte County for lunch. See you at 1:24.

(Whereupon, the jury retired from the courtroom at 11:54 A.M. for the lunch recess.)

MR. BADER: At this point for the record I would note my objection to the recess called without any forewarning to my cross examination at this point.

THE COURT: Object all you want to.

(Whereupon, the lunch recess was taken.)

(Whereupon, after the lunch recess, the following

proceedings were had in Chambers.)

THE COURT: Prior to the lunch break I stopped this case for recess in the middle of cross examination. I am here to state right now that the Defendant has a right to cross examine in detail. Cross examine in detail anything the Prosecution has to say. But I am also saying that it's gone past the bounds of reason and good taste by the use of the word "cunt" many times by Defense Counsel in a manner which I perceive to be in total harassment of the witness. You will be permitted, and I am speaking to Bob Bader right now, you will be permitted to cross examine to your heart's content, minute details, the time will not be limited. But you will not use the word "cunt" unless you have an occasion to use it as a quote as the witness has stated that the Defendant said. You will not lie down on the floor and assume positions that you consider to be what the witness testified to as you did do.

Now, this has got to the point where it grossed me out, and I'm hard to gross out. It grossed out Owen Lucky, a local attorney, and he's hard to gross out. And the Clerk, who happens to be a female lady, came through here with tears in her eyes. She had all of it she could stand. If it happens one more time, I will proceed on under the provisions of Rule 3.830,

Rules of Criminal Procedure, pertaining to contempt, and I'm giving you fair warning of it. I'm not here to argue with you, so you needn't say anything to me. If you want to put it on the record, have at it.

MR. BADER: No, sir. I'm not proposing to argue with you, but I do need some guidelines as to what you're talking about.

THE COURT: Let's go.

MR. BADER: I don't -- but I'm not apprised of what it is that you're talking about.

THE COURT: If you want to refer to any part of the human anatomy, you will do so with the proper physiological terminology. The word "cunt" is a gutter slang term, and it will not be used in my courtroom other than as is absolutely necessary, and we are past that point.

(Whereupon, the in-chambers conference was concluded.)

(Whereupon, Court reconvened at 1:24 p.m. and the following further proceedings were conducted within the hearing and presence of the jury.)

THE COURT: You may be seated. You may proceed.

MR. BADER: (Indicating.)

Whereupon, the following bench conference was conducted out of the hearing of the jury as follows.)

THE COURT: Start wherever you want. We'll start back on the record. You can ask any questions you want.

MR. BADER: The question of whether or not the directions of the Court are clear enough to me, so that I don't get myself in a bind with the Court.

THE COURT: I think you know how not to get yourself in a bind. I think it's been perfectly well explained. Now you may proceed.

MR. BADER: Well, I want the Court to be aware that I am not satisified that I understand what the Court's getting at.

THE COURT: You want to let the jury out and argue with me awhile? Because I'm not going to argue with you.

MR. BADER: I don't want to argue with you.

THE COURT: Okay. Let's go. It's your time, you're on cross examination. Move on.

(Whereupon, the bench conference was concluded and the following further proceedings were conducted within the hearing and presence of the jury.)

MR. BADER: Leslie, would you read for me, please, the question, the last question, the point where the Court interrupted me, the response, and recessed, whatever it was that was going on?

THE COURT: I have instructed the Court Reporter that she will not go back and read anything that has been previously said. You can start at this point and go forward. Any question that you think is proper.

MR. BADER: Judge, may I ask the jury be excused, then, so that I can get my question and answer back?

THE COURT: You may.

MR. BADER: Thank you.

(Whereupon, the jury retired from the courtroom at 1:25.)

THE COURT: Leslie, you may read the last question asked prior to the recess. You will not go back any further than that.

(Whereupon, the following question was read back by the Reporter as follows:

"Question: You said he touched your cunt, and I want you to tell me how and when and what he did that lets you tell this jury that that is what you know he did.")

THE COURT: Now, if you want to rephrase that question without the use of the offensive word, you may do so. But you will not use that word again.

You may bring in the jury.

(Whereupon, the jury returned to the courtroom and the following further proceedings were conducted.)

BY MR. BADER: (continuing)

Q Mrs. Hollander, you were describing when we were interrupted in the middle of your testimony, the conduct of your assailant, and you described that this hand had touched your body, and I asked you where and how and what he actually did, when you said he touched that part of your body that we will call generically or physiologically your vagina.

Can you tell me, describe for this jury, the conduct of your assailant in that respect?

A He -- it was after he had grabbed my arms and had thrown himself upon me. Then he reached under my nightgown and felt the vagina with his hand and then that's when he --

Q Ma'am, when you say he "felt", can you tell me, or tell --

A He just touched me.

Q But I don't know what you mean when you say "he just touched me", which hand did he use?

A His left hand.

Q And what part of his hand did he use?

A His fingers.

Q Did the fingers enter your vagina?

A No, I don't think so. No.

Q Ma'am, I thought you said, "No, I don't think."

A No.

Q Do you know?

A No, it didn't.

Q They never --

A He touched the outer part.

Q What outer part?

A (No audible response.)

Q What outer part, Mrs. Hollander?

A The outer part of the vaginal area.

Q With his fingers?

A Yes.

Q How is that you're certain, if you are, that no part of his fingers entered into your vagina?

A Well, I don't -- I don't see what difference that would make one way or the other anyhow.

Q Mrs. Hollander, it isn't my place to explain what difference it makes. I can't answer your question. It is important, and in determining the totality of this evidence that you answer my question.

Would you please answer my question. Take as long as you wish to think about it.

A At the time you aren't exactly keeping a record of exactly how things are happening. Things are just happening. I know that he reached under my nightgown and that he touched me, but shortly after that he raped me.

Q Mrs. Hollander, I didn't ask you that question.

MR. BERRY: Your Honor, I'm going to object to his comments as to her answer. Now, he can cross examine her, and she has given the best answer that she can. I don't think it's fair for him to comment on her answers.

MR. BADER: I would respectfully request the Court to instruct the witness to answer the specific question, her answer was not responsive to my question.

THE COURT: Mrs. Hollander, the Defendant, through his attorney, has the right to examine or cross examine, as it is, in detail the events to which you have testified. You should answer whatever question he asks unless there is an objection as good as you can. Now, there may be answers that you cannot give a yes or no to, so say so to the best of your recollection. You must answer the question.

MR. BADER: Leslie, would you read the question, please?

THE COURT: I will add to that and say, emphasize, to the best of your recollection. If you don't know, say you don't know. And you do not have to answer any question that is not asked.

Now, would you read the last question back?

(Whereupon, the question was read back by the Reporter as follows:

"Question: How is it that you're certain, if you are, that no part of his fingers entered into your vagina?")

BY MR. BADER: (continuing)

Q Do you now know the question, ma'am?

A I do not believe that he -- I don't know if he put his fingers in. I don't know. I don't think so.

Q Did you at any time ever advise the police that he entered your vagina with his fingers?

A I -- no, I don't believe so.

Q Did the police ever ask you?

A No.

Q Did Mr. Berry ever ask you to explain in detail what conduct your assailant did that night?

A No.

Q During the noon recess, did you have an opportunity to review your statement made to the police the day of the assail (sic) on you?

A No.

Q You have not read it?

A I have not read it.

Q Have you discussed it with anybody while -- during the noon recess?

A I didn't discuss the case with anybody during the noon recess.

Q After he put his hand on your vagina, what next did he do, specifically?

A He penetrated the vagina with his penis.

Q How were you able to tell that he penetrated the vagina with his penis?

A Because he was close to me, because it felt like it.

Q When you say "it felt like it", Mrs. Hollander, what are you saying, what do you mean, would you explain it, please, to the jury?

A (No audible response.)

Q If you can?

A Well, it didn't feel like a finger. It was larger. He was very close to me. He couldn't have had his hand in between himself and me.

Q He couldn't have his hand in between himself and you.

A No. And besides, he was using that hand at that time to feel my breast, and other areas, running his hand up and down my body.

Q Are you saying that your assailant was feeling your body, holding your mouth, and --

A No. He was no longer holding my mouth.

Q I'll rephrase it.

Are you saying that your assail was feeling your

body from your breasts to your vagina, and at the same time copulating with you?

A Yes.

Q Is that what you're saying?

A Yes.

Q That it was all going on simultaneously?

A Yes.

Q Even while his hand was moving from your breast to your vagina?

A Yes.

Q And on top of you, and had his penis in your vagina, and you could feel it, and you could tell it, and you knew it was different from a finger?

A Yes.

Q Is that what you're saying?

A Yes.

Q You said the penis was larger than a finger.

A Yes.

Q Whose finger were you comparing it with, Mrs. Hollander?

A No one.

Q Mrs. Hollander, do you now, in that witness chair, under oath, in this courtroom, can you look at that jury and say that you know that that man who you said was your assailant never put his finger in your vagina, but he put

his penis in your vagina; can you look at the jury and say that, ma'am?

A Yes.

Q Can you look at the jury and say that?

A Yes, I can look at the jury and say that.

Q Say it, ma'am.

A (No audible response.)

Q Say it.

MR. BERRY: Your Honor, I don't think he can instruct her what to say, that's ---

THE COURT: Objection be sustained.

You can ask questions, but you cannot command a witness to do anything.

BY MR. BADER: (continuing)

Q Can you say it, ma'am?

A Yes, I can say it to each and every one of you.

Q Will you say it to them?

A The man sitting in this courtroom entered my home on the morning of May 13th and raped me.

Q I asked you if you would state to them that he put his penis and not his finger into your vagina.

A Yes. He put his penis and not his finger into my vagina.

Q Do youhate Joe Hayes, Julie Hollander?

A No.

Q Do you hate me?

A I -- no. I do not hate Joe Hayes.

Q Just me?

A (No audible response.)

Q Is that the way you feel, Mrs. Hollander?

A Mr. Bader, you have been antagonizing me for several months.

Q Did I antagonize you the day I came to your house with my wife?

MR. BERRY: Your Honor, at this point I'm going to object to any further lines along -- this has nothing to do with the --

THE COURT: Objection sustained.

MR. BADER: May I be heard at all?

THE COURT: No, sir, you may not be heard. You may continue. The objection has been sustained. What the witness thinks about you has nothing to do with it.

MR. BADER: It has to do if -- I must be heard, if we could excuse the jury, that I may be heard.

THE COURT: Mr. Bader, I told you, you may proceed.

BY MR. BADER: (continuing)

Q How long did this entire episode take, Mrs. Hollander?

A Maybe ten minutes. I don't know. It seemed like

half an hour, but I know it wasn't that long. It seemed forever.

Q But you think it only took ten minutes?

A Ten, probably.

Q Is that what you told Officer Marvin when you gave your statement?

A I don't remember if I -- what length of time I said.

Q Do you recall what you told Officer Marvin about the height of the defendant?

A I believe I told him 5'10", because -- I really thought more like 6 feet, but I thought I might be exaggerating. So I said 5'10".

Q Why would you exaggerate, Mrs. Hollander?

A I thought he might appear taller to me because he was slender. So I didn't want to exaggerate, because they'd be looking for the wrong person.

Q Did you ever tell Officer Marvin that the assailant was slender?

A I don't recall, I probably did. Slender, slim, I don't know.

Q Is there a difference between slender and slim, Mrs. Hollander?

A They're about the same. Just probably used one of those words, I don't know which term I used.

Q Mrs. Hollander, is there in your mind any difference when you describe a white male who you said is a certain height and was your assailant, whether you call that person slim or slender?

A To me they're the same.

Q There's no difference, whatever?

A No.

Q So that a person who was 6 feet tall and a 160 pounds, as you described, could be slender or slim, even if that person was 6 feet tall and only a 120 pounds?

A Then I'd call him skinny.

Q Then he'd be skinny.

Well, between 20 pounds and 60 pounds, so I guess he's got to be about a 140 pounds, would that make him slender?

A (No audible response.)

Q Would it, ma'am?

A I suppose so.

Q And when would he become thin, where does that fit in?

A I don't know.

Q How about emaciated, does emaciated fit in with those other words in your mind, because it's your testimony-

A No.

Q It doesn't fit in?

A No.

Q Did you tell Officer Marvin that he was 5'9" or maybe 10, compared to Officer Marvin?

A I don't believe I compared him to Officer Marvin.

Q Well, did Officer Marvin compare himself and ask you to look at him?

A No, I don't think he did.

Q Did Officer Marvin tell you, well,"I'm 5'9", how tall is he? I'm standing here, I'm 5'9" -- "

A No, I don't believe he referred to himself.

Q Do you remember?

A (No audible response.)

Q Do you remember, Mrs. Hollander?

A I'm sure he didn't refer to himself. I think I just told him what I thought.

Q I asked you to look on page three of the statement you made --

MR. BERRY: Your Honor, at this time I'd like to approach the bench.

THE COURT: All right.

(Whereupon, the following bench conference was conducted out of the hearing of the jury as follows.)

MR. BERRY: Your Honor, I'm going to object to anything -- in referring to that, he's had it marked for identification purposes only. She has identified

it. Now if he wants to put it into evidence, let's go the proper route, but he's trying to put it in in the back door.

THE COURT: You can ask if she made the statement. You can show the statement to refresh her memory, then she can answer what she wants to.

MR. BERRY: Thank you, sir.

(Whereupon, the bench conference was concluded and the following further proceedings were conducted within the hearing and presence of the jury.)

BY MR. BADER: (continuing)

Q I ask you to look at page three, at the line where my thumb is, and ask you if that helps to refresh your memory.

A (Examining.) Yes.

Q Okay. Now, I ask you again, did Officer Marvin suggest to you what his height was and ask you to make a comparison between his height and that of the assailant?

A It was after I had stated that I thought he was 5'10" that Officer Marvin said that he was 5'9". And did that compare, I had already stated that he was 5'10".

Q Mrs. Hollander, Mr. Berry can redirect you and explain all your answers. I didn't ask you that.

I asked if Officer Marvin had ever said, "I'm 5'10", tell me what his height is."

Now, did he do that?

A He asked that afterwards. He said that afterwards. I had already said --

Q Ma'am, that wasn't my question --

MR. BERRY: Your Honor, I'm going to object. He's now harassing her.

MR. BADER: No, I'm having a difficult time with a witness who wants to explain away any inconsistency, Judge, and I ask that she be instructed to just answer my question. Mr. Berry can get back on redirect --

THE COURT: The witness has an absolute right to explain the answer she makes.

MR. BADER: But I ask you to instruct her to first answer my question.

THE COURT: She did. Go ahead.

BY MR. BADER: (continuing)

Q Did Officer Marvin stand there and say, "I'm 5'9", how tall was your assailant compared to me?"

A He said he was 5'9", how did that compare with what I had said.

Q And then what did you say?

A I said he was a little taller.

Q May have been 5'10", is that what you said?

A According to the thing it says that I had said the 5'10" before.

Q But you said 5'10" compared to him?

A I said a little taller than he.

Q That made him 5'10"?

MR. BERRY: Your Honor, I'm going to object at this point. I would like to approach the bench with it.

(Whereupon, the following bench conference was conducted out of the hearing of the jury as follows.)

MR. BERRY: Your Honor, at this point I'm going to object to the line of questioning. Now he's got a right to show her to refresh her memory, but he has a copy in his hand, and she has answered the question. Now he's trying to turn it around on her. She's answered it exactly the way it is in the statement.

THE COURT: (Examining.)

MR. BADER: Do you want her to read the other line? I'm perfectly willing for her to read the other line. If the line above it is what you're concerned with, I'm perfectly willing for her to read that. I'll get to that very quickly.

MR. BERRY: She has. He's asked the question and she's answered it.

THE COURT: Go ahead.

(Whereupon, the bench conference was concluded and the following further proceedings were conducted within the hearing and presence of the jury.)

BY MR. BADEA: (continuing)

Q Mrs. Hollander, in response to my question, you indicated that you had said prior to the time he said he was -- that Officer Marvin was 5'9", that you had told him you thought he was 5'10"; is that correct?

A That's correct.

Q Is that the explanation you want to give, that you had told him you thought he was 5'10"?

A Yes.

Q What else did you tell him in that same sentence, Mrs. Hollander?

A (Examining.) I said it's really hard to say.

Q You said he was 5'10", but I guess it's a little hard to say.

Is that what you said?

A That's what I said.

Q Why was it hard to tell Officer Marvin whether he was 5'10" or not?

A I felt that when I -- that you should be exact, and it's hard to be exact about something like that.

Q Well, when did you think he might have grown two inches from 5'10" to maybe 6 feet?

MR. BERRY: Your Honor, at no time has she ever said that he's grown any.

THE COURT: Sustained.

BY MR. BADER: (continuing)

Q I understand. When did you think that he may have been 5'10" or even up to 6 feet?

A My first impulse in giving a description was to say that he was 6 feet.

Q That is not my question.

A I felt --

MR. BADER: I ask the Court to instruct the witness to answer my question.

THE COURT: The witness can answer to the best of her ability, whether it suits you or not is beside the question.

Answer the question to the best of your ability.

THE WITNESS: Okay. My first impulse was to say that he was 6 feet. I felt that I might be exaggerating, so I knew he was at least 5'10", because I was judging by my husband's height. I felt safe in saying 5'10", that he wasn't shorter.

BY MR. BADER: (continuing)

Q Mrs. Hollander, what makes you afraid of exaggerating?

You said that several times in your testimony. What is that you don't want to exaggerate, why is it that you don't want to exaggerate?

A I guess it's just my nature. I don't like to

exaggerate. I want to tell you the truth to the best of my ability. I feel to add to it wouldn't be right.

Q So that when you told Officer Marvin that you never saw him face to face, were you telling the truth then?

A I was speaking during the attack.

Q Did you tell Mr. Marvin that, "I never saw him face to face during the attack"?

A Well, I'm sure earlier in the deposition or in the statement that I told him I raised up on my elbow and turned towards him and I looked expecting to see my daughter. I certainly saw him then, because I thought I was going to be looking at my daughter.

Q You are sure?

A So at that moment I had to be looking at somebody. And it was him.

Q If I told you you didn't say that to Mr. Marvin, you say you think --

MR. BERRY: Your Honor, now he's trying to testify again.

MR. BADER: Judge --

MR. BERRY: He can't --

MR. BADER: I have a right to unlimited cross examination. If I'm going to be interrupted every time the question -- question pierces the witness's credibility, I'll never get through with cross examination.

THE COURT: If I told you that so-and-so, facts not in evidence, that's a hypothetical. Sustained.

BY MR. BADER: (continuing)

Q Mrs. Hollander, read your statement and find for me where you told the officer that you saw him face to face.

A (Examining.) Well, I said I was awakened by something touching me, and I turned, there was a person crouched beside the bed. I thought it was my daughter.

Q Mrs. Hollander, I didn't ask you to read it. If you're going to read it, we're going to get into a problem. Just find where you said, "I looked and saw him face-to-face."

A Well, that's the time I'm talking about.

Q Did you tell Officer Marvin that, "Yes, I looked and I saw his face"?

Did you?

A No, I didn't say that to him.

Q You never did. But you did say at the bottom, "I never saw his face," didn't you?

A (Examining.) Well --

Q Yes, ma'am?

A That's what it says.

Q That's what it says, and that's what you said, isn't it?

I ask you to look at that line even more carefully, Mrs. Hollander, was there a typographical error on that line?

A (Examining.)
Q (Indicating.)
A (Examining.)
Q Was there, ma'am?
A No.
Q Are your initials there in the middle of that sentence?
A (Examining.) Yes.
Q Do you know why your initials appear right in the middle of that sentence?
A The initials are there to show that's the bottom of the page.
Q In the middle of that sentence?
A It's right at the end of the sentence. The initials are at the beginning and the end.
Q That's what the initial is there for?
A Yes.
Q Do you remember putting your initials there, ma'am?
A Yes.
Q You told the jury earlier that you had gone to bed at 11:30; is that correct?
A Yes.
Q That you thought one of your children might have gone to bed at the same time with you?
A Yes.

Q Do you remember which child that was?
A Gail.
Q She was younger or older?
A Older.
Q And the younger one was still out?
A She was out.
Q She's the seventeen year old?
A She was eighteen at that time.
Q She was eighteen at that time.

Then you said that the front door was an old front door, because it was an old house, with a big window in the door; correct?

A That's right.
Q But the door was unlocked?
A The door was standing open.
Q The door was not only unlocked, but it was standing open?
A That's right.
Q And that the screen door was the only door that was closed?
A That's right.
Q Was the screen door latched or locked?
A No. We didn't have a hook on it then.
Q Was there a light left on?
A Yes.

Q Where was the light, Mrs. Hollander?
A The light was on the table just inside the door.
Q Inside the front door?
A Yes.
Q And that was the living room, wasn't it?
A Yes.
Q And your bedroom is through where; how do you get to your bedroom?
A There's a doorway between the hall and the living room, and my bedroom door is right inside that door.
Q All right. And as you -- was the door between the living room and the hallway open or closed?
A It was closed.
Q Why was it closed, Mrs. Hollander?
A I closed it because I left the light on in the living room and it disturbs my sleep. So I closed the door so the light wouldn't keep me awake.
Q You said something about being negligent in leaving the door and the house unlocked?
A We weren't in the habit of locking the door. We left the door open for ventilation.
Q And the light on?
A The light was on for my daughter to come home.
Q Where was your other daughter?
A Upstairs.

Q Mr. Hollander wasn't living at home anymore, was he?

A No.

Q You were separated at that time?

A Yes.

Q Was there a divorce pending?

MR. BERRY: Your Honor, that's irrelevant.

THE COURT: Totally immaterial, Mr. Bader. Sustained.

MR. BADER: If I only be allowed to pursue the matter, I might be able to show some relevance.

THE COURT: No relevance as to whether or not they were separated.

BY MR. BADER: (continuing)

Q Did you know whether or not your daughter had returned home, the younger daughter; what's her name?

A Laura.

Q Do you know whether or not she had returned home at the time that you were awakened by your assailant?

A No.

Q Where did she sleep?

A In the other bedroom downstairs.

Q And where was Gail sleeping?

A Upstairs.

Q This downstairs bedroom where your younger

daughter would have been if she had been at home, how far removed from your bedroom is that bedroom?

A It's in the opposite corner of the house.

Q Well, are we talking about several rooms away or just on the other side of the living room?

A Well, it's off of the kitchen across the living room, which is a large room. The house is about forty feet square, and we were in direct diagonal, you know, opposite.

Q Have you ever had occasion to scream or try to arouse the attention of your daughter on the first floor?

A Not by screaming, but she's not easy to wake up.

Q You didn't know whether or not she was even home, did you?

A I knew she was home by then because the light was off in the living room.

Q The light was off in the living room?

A Um-hmm (affirmative).

Q You knew that before the assailant came in?

A No, but when -- the doors were open and there was no light coming in from the living room.

Q You were able to determine that when the assailant awakened you?

A Yes. I could tell if the light was on in the living room.

Q The light was off?

A Yes. When my daughter came in, she turned the light off.

Q How do you know the assailant di .'t turn the light off?

A Well, I guess I don't know that the -- the light was off.

Q But you determined from that until just now that your daughter had come home, that's why the light was off; is that correct?

A Yes.

Q That was an assumption on your part?

A I assumed she was home, yes.

Q All right. You didn't scream because you didn't want them to come into the room?

A Well, I really didn't have an opportunity to scream before he made his threat anyhow, and afterwards I wouldn't have screamed. I only wanted him to leave.

Q You went from your bedroom to what room when you -- after the assailant left?

A To my daughter's bedroom, my younger daughter's bedroom.

Q Which was where?

A Downstairs.

Q Was she there?

A Yes.

Q You went immediately to her room?
A Yes.
Q You didn't stop in the bathroom?
A I don't believe so, no, no.
Q Where is the telephone?
A One beside my bed, and there's one right outside of her bedroom.
Q Did you make any attempt to call the police?
A Not at that time.
Q You went to your younger daughter's bedroom, and what did you do?
A Well, I should go back. I did forget to mention the first thing I did was go and close the front door. Late. Afterwards. Then I went to my daughter's bedroom.
Q When you say you went to close --
A The front door was still standing open. My first impulse was to close the front door. So I pushed it shut.
Q Then what?
A Then I went to my daughter's bedroom.
Q Awakened your daughter?
A Yes.
Q What did you do then?
A Went upstairs to my older daughter's room.
Q You just awakened your younger daughter and left her s -hen went upstairs?

A No, I asked Laura to come with me upstairs to her sister.

Q And then what?

A We went upstairs and then I told them what had happened. I knew we had never been in the habit of locking our doors. My husband never permitted us to lock doors. We didn't even have locks on them. There was no lock on the front screen door, we had been trying since he left our home to break our habit, to lock the doors, and I knew that I -- I wanted to use this as a means of shocking us, I guess, to break a long-standing habit. Never in their entire lives have they been in the habit of locking doors. It was impossible to retrain ourselves.

Q That was your purpose in going upstairs to your daughter's room?

A That was my number one purpose. I imagine my second purpose was that I wanted some comforting.

Q Did you get it?

A Of course.

Q Did you describe to them what had happened to you?

A I didn't describe it in detail, I just simply told them what had happened, that I had been raped.

Q How long was it before you called the police?

A I would say probably fifteen minutes.

Q And how long after that before the police came?

A The first squad car arrived immediately with, you know, the dispatcher kept me on the telephone until the first police officer was at the door. I know it was less than five minutes.

Q And from that point where did you go when the police car arrived?

A That was the road patrol that came, and they came and stayed with us until the detectives came, and when the detectives came, shortly after they arrived and asked a few questions, one of them took me to the hospital.

Q How long after you called the police was it before you went to the hospital? Elapsed time?

A I would guess half an hour or something like that.

Q Did you give a statement to any of the officers?

A No, not -- no, not a detailed statement. I just told them that a man had entered and I told them that he had stumbled on the stairway, and you know, he had fallen against the door and slammed it shut. They were going to be looking for fingerprints. So that's why I told them about the door slamming shut, that he had to open the door to get out of the bedroom. And I also told them about the door between the bedroom and the -- I mean between the living and the hallway was closed. And I didn't describe in detail the actual attack, that statement was given at the police station.

Q When you went to the hospital, who carried you there?

A Terry Marvin took me to the hospital.

Q Do you know the names of the detectives who came to the house?

A Umm -- I do now, I didn't know Detective Gandy before. That was one of them. And Detective Shoup. I knew his name.

Q Did you recognize any of those officers when they came?

A I recognized Shoup.

Q Was he with Gandy at the time?

A I'm not sure if they arrived together, I'm not -- I'm not even certain if he was there before I went to the hospital. I know he was there when I came home, but I -- the two officers that arrived to begin with, the road patrol, and then Terry Marvin came for a little while, there seemed to be a lot of people around. I'm not exactly certain, I know that Shoup was there when I came home because I recognized him as somebody that I knew. And whether he -- I feel that he wasn't there before I went to the hospital, but I could be wrong about that.

Q Yes, ma'am. Who took you to the hospital?

A Terry Marvin.

Q And what happened at the hospital?

A The nurse took me into the examining room, and she had me remove my clothing and put on a hospital gown. The doctor came in and they have a kit that is supplied by the government, I guess, with instructions on what to do, how to examine you. The nurse read the instructions as the doctor proceeded with the examination.

Q Between the time you closed the front door and the time you went to the hospital, how much time elapsed?

A Probably forty-five minutes to an hour.

Q Okay. How long were you at the hospital?

A Not very long, fifteen, twenty minutes. Something like that.

Q Who made the examination of you?

A The doctor that was on the duty. I don't know his name.

Q Did you give him a history of what occurred?

A He didn't ask me anything.

Q Can you tell the jury what part of your body he was examining?

A He examined the vagina and the rectal area, routine exam.

Q Did he make any statement to you at that time?

A No.

Q Did you make any statement to him?

A Yes.

Q What did you tell him?

A I said to him that I didn't think he would find much evidence, he didn't comment.

Q From the hospital, where did you go?

A To the police station.

Q With Officer Marvin?

A Yes.

Q Did he offer to take you home first?

A He asked me if I wanted to make a statement then or if I wanted to wait until the next day, and I said I would just as soon do it now.

Q So you went from the hospital down to the police station?

A Um-hmm (affirmative).

Q And that statement was transcribed on a recording machine?

A Um-hmm (affirmative), yes.

Q And it is from that interview on the recording machine that the documents you have previously identified was typed that you signed?

A Yes.

Q And that's the only statement you have ever given that you have signed and written, recorded, anywhere except your deposition?

A Yes. About that, yes.

Q Then from the police station where did you go?
A I went home.
Q From the time you left the hospital until you returned home, what period of time elapsed?
A I don't know.
Q Approximately, if you know?
A I suppose an hour or something, I don't know, however long -- however long it took for the deposition.
Q When you arrived home, did you have any idea what time it was?
A No.
Q I believe you told the jury earlier that you were working as a teller at the First National Bank in Punta Gorda?
A Yes.
Q Did you go to work that morning?
A I did.
Q Work all day?
A I did.
Q Did you work the following day?
A Yes.
Q The day after that?
A I was a new employee, I had worked there less than two months. I didn't want to take off. When you've had to return to work when you're 50 years old, you want to make a

good record. I thought I was going to go home that day, but I was so keyed up I couldn't relax, I couldn't have gone home and gone to sleep or anything, anyhow.

Q When -- or did you ever consult your own physician regarding the consequences of the assault on you?

A I consulted my own physician about two weeks ago.

Q The first time?

A It was the first time I discussed this with him.

Q Did you consult anybody at all about your condition in the days immediately following the alleged assault?

A I went back to the hospital to find out the results of the tests.

Q And what did you find out?

A That they were negative. That I was all right.

Q Results were negative?

A That's right.

Q Did you see the doctor?

A No.

Q Did you ask to see the doctor?

A No.

Q Do you know the doctor's name?

A I do now because I saw it on the paper, Dr. Stein.

Q What paper did you see?

A On a subpoena for the earlier --

Q Where did you see a subpoena for Dr. Stein?

A It was the one to me that showed his name on it that was -- it was for the trial in May.

Q Paper sent to you had his name on it?

A It had the list of witnesses on the -- on my -- on the subpoena it showed his name. My name and his name.

Q Anybody else's name?

A No.

Q Just yours and his?

A That was all that was on my copy.

Q You described the feelings of your assailant as being nervous and tense; is that true?

A That's how it seemed to me, yes.

Q That his heart was beating rapidly?

A Yes.

Q I asked you earlier while you were laying on your stomach with your hand underneath your body, you said that he felt down underneath your body and reached and touched first your breasts and then your vagina; is that right?

A Yes.

Q You said it was difficult for him to get his fingers inside your vagina pressed against his weight on top of your body down against the bed; is that what you told me?

A That wasn't exactly the way it --

Q Well, tell me the way it was exactly.

A He reached around in front of me to feel the vagina, and then he removed his hand and when he inserted the penis --

Q Mrs. Hollander, are you aware that it is essential in this case that there have been a penetration to make out this crime; do you know that?

MR. BERRY: Your Honor, may I object to that. I'd like to approach the bench.

THE COURT: Very well.

(Whereupon, the following bench conference was conducted out of the hearing of the jury as follows.)

MR. BERRY: I'm going to object to that question on the grounds that it's irrelevant, it's immaterial, it's a matter of law, and he can ask her questions of fact. He's now going into whether or not she knows about the law on that, and that's -- there's a possibility that he's misstating the law. I do not believe penetration is necessary under the definition of sexual battery, it's a union or touching of the sexual organs of another.

MR. BADER: I think it's a simple question, if she knows she can say. If she doesn't know, she can say.

THE COURT: Objection be sustained on the grounds

of total immateriality whether she knows or not.

(Whereupon, the bench conference was concluded and the following further proceedings were conducted within the hearing and presence of the jury.)

BY MR. BADER: (continuing)

Q After he made the effort to touch your vagina with his hand, you say he penetrated your vagina with his penis?

A Yes.

Q In the position you were in, you were flat on your stomach and he was right on top of you; is that correct?

A Yes.

Q Can you tell me where your hands were, where was your right hand?

A My right hand was pinned under my body.

Q Okay. Where was your left hand, ma'am?

A I don't know. I don't remember. He had a hold of it part of the time and part of the time he didn't. It was -- I don't know where it was. I wasn't in a position to, you know, hit him with it or anything.

Q Was your hand loose at all?

A Yes, I'm sure it was.

Q Your left hand was loose?

A Part of the time.

Q And you were laying straight, flat on your stomach?

A Not straight, flat, no, my arm was underneath me, I was a little bit to the side.

Q You mean your body was laying at some sort of an angle?

A I wasn't just flat on my stomach, I was probably just a little to one side.

Q Well, were you laying at a prone position?

A Yes.

Q Feet straight out from the rest of your body?

A Yes.

Q Could you tell what he was doing with his right hand?

A No.

Q It was his left hand that touched your breast and vagina; is that right?

A Yes.

Q What did he do to force his penis into your vagina?

A Well, I could feel his body push against me.

Q And you could feel his body all the time, because I think you said he was on top of you from head to foot?

A All right. I could feel his body in that area, and from --

Q Well, was anything special or unique that you could tell about his body that he could get his penis into your vagina like you have told this jury?

A I could just feel him push with his hips.

Q He pushed with his hips?

A Right.

Q Did he say, "Spread your legs"?

A No.

Q Did he say to put some oil on you or some Vaseline on you or something to assist you?

A He didn't make any statements other than what I have said.

Q Did he use any oil or any Vaseline?

A I don't know. Not that I know of.

Q Mrs. Hollander, were you in the custom of allowing your pubic hairs to grow in their natural state?

A Yes.

Q Did he in any way separate your legs and hold them apart?

A With his legs.

Q You said you felt his legs, his body on top of you, did he ever put your legs apart?

A He didn't actually pull them apart, he just pushed them apart with his leg.

Q Well, now, your legs came apart, did they?

A (No audible response.)

Q Does that make it easier to fit it in, Mrs. Hollander?

A I suppose.

Q Fits the story, too, doesn't it?

MR. BERRY: Your Honor --

THE COURT: Objection be sustained.

I assume you were fixing to make one.

MR. BERRY: Yes, sir.

THE COURT: Objection be sustained.

BY MR. BADER: (continuing)

Q Mrs. Hollander, how long did it take him to enter your vagina?

A I don't know.

Q How long did he remain?

A Not very long.

Q What did he do when he finished and removed himself from your vagina?

A That's when he explored the rectal area with his hand.

Q Now, in order to do that, did he have to change his body in relation to your body?

A He had to withdraw a little bit.

Q Which hand did he use to explore your rectal area?

A The left hand.

Q Again, his left hand?

A Right.

Q What did he do with left hand, ma'am?

A He felt for the rectum and when he found it he inserted his penis there.

Q How did you determine that he found the rectum, ma'am?

MR. BERRY: Your Honor, now this is getting to the point of ridiculousness. He's asked the question and she's answered it. I'm going to object to that point, he's had complete cross examination on this.

MR. BADER: Judge, I'd like to be heard on this. I don't enjoy this one bit, either, if anybody thinks -- I'm a court appointed lawyer, that I could take this job and do this for my fun and my gain, to do --

THE COURT: (Indicating.)

THE BAILIFF: Mr. Bader, just a minute, please. I am taking the jury out.

(Whereupon, the jury retired from the courtroom.)

MR. BADER: I've had a difficult time with this case, and I don't need to be interrupted and have speeches made.

THE COURT: We'll have a fifteen-minute recess. The objection is still before the Court.

(Whereupon, a short recess was taken.)

THE COURT: Where were we?

MR. BERRY: Your Honor, I believe that at the point prior to the recess that I have objected on the grounds

that he's continuously going over and over and over the same thing, and she's answered these questions to the best of her ability. He's been given complete freedom of cross examination. I think now it's getting to the point of ridiculousness in that regard, and I just --

THE COURT: State specifically the ground that you're objecting to.

MR. BERRY: Yes, Your Honor, more specifically, he asks her a question and she answers him, and then he tries to put words in her mouth. To that aspect, she's doing the best she can.

THE COURT: The Defendant is entitled to a thorough and complete cross examination of any witness against him. When it gets to the point of being repetitive -- at this point I will overrule the objection.

(Whereupon, the jury returned to the courtroom and the following further proceedings were conducted within the hearing and presence of the jury.)

BY MR. BADER: (continuing)

Q Mrs. Hollander, you previously told the jury that you had met me on more than one occasion in my duty as court appointed lawyer for Mr. Hayes.

I believe you said you met me first when I came to your home with my wife; is that correct?

A That's right.

Q Do you recall meeting me in the courthouse in Port Charlotte on September 23rd, 1980?

A In Punta Gorda?

Q Yes.

A Yes.

Q And do yourecall the purpose of that meeting?

A For a deposition.

Q Yes. And the deposition, there was a court reporter present?

A Yes.

Q Just like the young lady here today?

A Yes.

Q Do you remember that you were given an oath and we asked certain questions?

A Yes.

Q Earlier in this trial you testified that from your knowledge gained on the night in question, in the moments, seconds, that you saw the assailant stumble out of your room and again in the seconds as he ran down the street past your window, you saw a sufficient silhouette that you could identify him.

When I asked you, you told the jury today, yes, that's him; is that correct?

A Yes.

Q I ask you now, did you say to Detective Shoup --

MR. BERRY: Line and page, please.

MR. BADER: Sixteen, bottom of the page.

BY MR. BADER: (continuing)

Q Did you say to Detective Shoup, (reading)

"This is the man, I would know him anywhere, I'll never forget his face"?

I'm sorry, that's not what you said, that's my question.

Do you remember the answer to that question?

A (No audible response.)

Q Do you remember your answer?

MR. BERRY: Excuse me, Mr. Bader, what page are you on?

MR. BADER: Well, I went from sixteen to seventeen.

MR. BERRY: Thank you.

MR. BADER: It's the last line on sixteen and the answer is on seventeen.

THE WITNESS: Did I say that to Detective Shoup, is that what you--

BY MR. BADER: (continuing)

Q No, ma'am, I asked you -- I asked you a question, the bottom of page sixteen, (reading)

"Did you say to Detective Shoup, this is the man, I would know him anywhere, I'll never forget his

face?"

That was the question I asked you; do you recall your answer to that question?

MR. BERRY: Your Honor, I'm afraid I don't understand what is going on here. If he's attempting to impeach her, she's got a right to review it, her deposition.

THE COURT: Sustained.

MR. BADER: May I be heard?

THE COURT: Sustained as to the form of the question.

BY MR. BADER: (continuing)

Q Do you have a recollection of your answer to that question?

A When did Detective Shoup ask me that question?

Q I really don't know.

Do you not remember when these questions were asked of you, do you not remember this event?

MR. BERRY: Your Honor, again I'm going to object to the form of the question.

THE COURT: Mr. Bailiff -- (indicating).

(Whereupon, the jury retired from the courtroom.)

THE COURT: The Court will sustain the objection as to the form of the question. You can use a deposition by reminding the witness where it was taken, when

it was taken, who was present, reading the question, reading the answer, and asking if you recall the answer. You cannot ask that question now and say, "What answer did you give then?"

The objection is sustained. If you want to do it right, otherwise -- bring in the jury.

(Whereupon, the jury returned to the courtroom and the following further proceedings were conducted within the presence and hearing of the jury.)

BY MR. BADER: (continuing)

Q Mrs. Hollander, you told this jury that you identified the Defendant from the photograph that you saw, the assailant, when he was in -- as he left your room and again as he ran past the window.

You also told the jury, I believe, that the detective brought you some photographs after the Defendant was arrested; is that correct?

A That's correct.

Q You saw pictures which you said, "That is him," and he said, "Yes, that's the man we arrested"?

A Yes.

Q You said that you can independent of all this other information, you could make an identification based on just what happened on the night in question, not from photographs and pictures; is that correct?

A Yes.

MR. BADER: I direct your attention, Counselor, to page sixteen.

BY MR. BADER: (continuing)

Q I'll read the following question from your deposition --

MR. BERRY: Line?

MR. BADER: Line seventeen.

BY MR. BADER: (continuing)

Q "Question: Okay. Now, ma'am, were you able, when Officer Shoup came back a day or two after the arrest of the suspect, to identify him from the photograph?

Answer: I looked at the photographs and selected one of them, and he said that was the man they had arrested.

Question: When you selected one of them, what did you tell the officer?

Answer: I don't remember what I told the officer.

Question: Well, did you say to Detective Shoup, this is the man, I would know him anywhere, I'll never forget his face?".

And you answered: "No, I didn't say that.

Question: What did you say?

Answer: I really don't remember what I said.

Question: Well, did you say this could be him or this might be him or out of these pictures this is the one?

Answer: Something like that.

Question: Were you able to say--are you able to say now that the photograph that you saw a day or two after the arrest of the suspect is the person that was in your room on May 13th?"

And your answer was: "I could not walk up to a man and say this is for certain the man, just on seeing him, because I did not see him that clearly as I'm seeing you."

Did you make those statements?

A Yes.

Q Mrs. Hollander, what have you done, what has happened that makes you now see him so clearly that you can say that is the man that you saw in your room on May 13th?

A This is the first time that I'm seeing him in person. Where from a photograph, a photograph that Detective Shoup brought, all you're seeing is the head. The total person, the build, the way they stand, the silhouette, the shape of their head is more evident in person than it is from a photograph.

Q In other words, you're telling this jury that you didn't know and the State of Florida didn't know until this

trial began whether or not you were capable of identifying this defendant in Court?

Is that what you're saying, it's only now today that you're here in Court and you can look at him for the first time in the light of this courtroom that you are able to say, "Oh, yes, he looks like the person way back a year ago, fourteen months ago, that was in my room in the dark?"

Is that what you want us to believe?

A The photograph looked like the person as nearly as I could tell. Seeing somebody in person is different than seeing a photograph.

Q Is your answer to my question that it is now and today that you see Mr. Hayes sitting in that seat that you are for the first time able to say that in your own mind, yes, that's the person you saw on May 14th; is that what you're telling this jury?

A (No audible response.)

Q Are you shaking your head "yes", ma'am?

A Yes.

(Whereupon, Defendant's Exhibit 5 was marked for identification.)

BY MR. BADER: (continuing)

Q Mrs. Hollander, I'll show you Exhibit 5 for identification and ask you if you've ever seen it before, and I ask you to hold it down so that the jury may not see it.

A (Examining.)

Q Do you recognize Exhibit 5 for identification?

A Well, yes. Yes.

MR. BERRY: Excuse me, I can't hear.

THE WITNESS: Yes.

BY MR. BADER: (continuing)

Q Okay. Can you tell me whether or not that is the photograph or the composite that was made based on your description of Mr. Hayes?

A I don't believe that I had a moustache in it.

Q I don't know if anybody could hear you, I did, but can you answer that?

A I don't believe that there was a moustache showing on the composite that I originally put together.

Q You don't believe the composite you had, had a moustache showing on it; do you know whether ot not the assailant had a moustache?

A I didn't know.

Q You didn't know?

A That's why I don't think -- that's why -- the one I put together did not have a moustache.

Q In other words, you did not know whether the assailant had a moustache.

Can I put it another way, Mrs. Lollander, did you know that he didn't have a moustache?

A Did I know that he didn't?

Q Well, when you described--

A No, I--

Q When you described him to the officer, didn't he ask you?

A I didn't describe him as having a moustache.

Q So to your knowledge, he didn't have a moustache?

A That's right.

Q All right, thank you.

I'll show you Composite Exhibit Number 6 for identification and ask you if you recognize that.

A (Examining.) Well, this would be more like the one I put together.

Q Well, can you --

A Without the moustache.

Q Can you tell us, the jury, if that is the one that you did put together?

A (Examining.) I thought that the hair was maybe a little shorter on the one that I put together. But other than that, that would be--

Q Well, now, you saw those at your deposition, didn't you?

A Yes, I did.

Q I showed them to you?

A I don't know if they were the same pictures.

Q Do you remember identifying the wrong pictures as being your composite?

A I remember that I wasn't sure about it.

Q Do you remember that you made a mistake and identified the wrong one?

A Um-hmm (affirmative).

Q You do? You have to speak up or the jury won't know.

A Yes.

Q Mrs. Hollander, I ask you to look at the person you identified as your assailant.

Is he in the courtroom now?

A Yes.

Q Can you tell me whether or not he has a moustache?

A Yes, he does. He does now have one. I don't know whether he had one then or not.

Q When you told the officers that he didn't have a moustache, did you also tell them that he didn't have a beard?

A I said that he did not have a beard. I did not specifically state that he did or didn't have a moustache. I knew he didn't have a beard because he brushed his cheek against me and I would have felt a beard.

Q You think you would have felt a beard?

A I think I would have felt a beard, or if he needed to shave.

Q But you have no way of knowing whether you would have felt a beard or not; do you?

A I think I would have felt a beard against my face.

Q When did he touch your face, Mrs. Hollander, I understood he touched the rest of your body with his hands, but you have not told us before that he touched your face.

A He did touch it.

Q With his beard?

A He touched my face with his cheek, and he touched my ear. He kissed my ear or put his tongue in it, or something. I'm not sure.

Q Well, have you ever told that story to anybody before?

A No.

Q If these things happened, you say that's how you would know that he had a beard?

A Yes. I think I would know if he had a beard.

Q Because he --

A Because I felt his face against my face.

Q But wouldn't you feel his moustache against your face?

A Not really. If he put his cheek against my cheek here I wouldn't feel his moustache if he had one.

Q Mrs. Hollander, is everybody's moustache or beard the same?

A No.

Q How do you know that the person that assailed (sic) you that night didn't have a beard and moustache?

A He may have had a moustache, he did not have a beard.

Q Because he kissed your ear, and --

A I could feel his face was clean shaven. That his cheek was clean shaven.

Q Can you have a beard without having -- and have your cheek clear at the same time, in your opinion?

A No.

Q You can't.

Have you ever seen pictures of oldtimers who grew beards only from under their chin and their neck and didn't have any hair on their chin or cheeks?

A Well, that wasn't the type of beard I was describing.

Q But you weren't looking at the beard, were you, Mrs. Hollander?

A Besides, I saw his face. I saw there was no beard hanging around his face.

Q You mean it was light enough in there that you could see that he didn't have any beard?

A I think I would have seen some -- I could see that his face was slim, if their had been a beard I would have

seen.

Q We don't know what you would have seen or might have seen, we want to go by what you did see, what you did experience. What might be or what's exaggerated, we can't go by.

Do you recall telling me about his kissing your ear on your deposition that day?

A I don't -- I don't believe I did.

Q Do you remember my asking you, (reading) "Do you recall what the picture of him -- "

MR. BADER: I'm sorry, Gene, page 19, line 12.

BY MR. BADER: (continuing)

Q The question that I asked you was, (reading) "Do you recall what the picture of him looked like in the newspaper story when he was arrested?"

MR. BERRY: Excuse me, what line was that, Mr. Bader?

MR. BADER: Twelve.

MR. BERRY: Page 19?

MR. BADER: I'm sorry, page 18.

MR. BERRY: Thank you.

BY MR. BADER: (continuing)

Q Your answer was (reading)

"Answer: One picture that I have seen showed a back view, like, you know, just a little bit of

the side of his face, that's the only picture I remember seeing.

Question: Can you remember now what it was about the picture that you looked at that made you pick the suspect?

Answer: The shape of his face, the length of his hair--mostly just the shape, you know, the shape of his face.

Question: The outline of his face?

Answer: That I would have seen the silhouette.

Question: And that was the silhouette that you saw when he got up to leave, the left side of his face?

Answer: No, the picture was a straight-on view."

Now, let me ask, the picture you're referring to was the one the police brought to you; isn't it?

A Um-hmm (affirmative).

Q But your recollection was based on his silhouette; wasn't it?

A The silhouette, both facing him as I'm facing Mr. Berry--

Q But you never faced him, did you, Mrs. Hollander?

A When I turned--when I first turned when he was crouched beside the bed.

Q Okay. I believe I left off at the bottom of page

18 where you answered, (reading) "No, the picture was a straight-on view."

That's the picture the police department brought you, right?

A Yes. I believe so.

Q Then I asked you the following question (reading)

"Question: Yes, but the silhouette that you saw--

Answer: But I saw the silhouette of a straight-on view also, when I was awakened and turned and looked It was not a side view."

Are you saying that you recognized the pictures of the police department as being the face of the person that you saw when you leaned over your shoulder?

A It came -- it came as close to fitting the description of the out--the shape of his head, the way his ears were placed.

MR. BADER: I have no other questions of this witness.

MR. BERRY: I have maybe just one or two.

I'd ask this be marked State's Exhibit Number 2 for identification purposes only.

(Whereupon, State's Exhibit Number 2 was marked for identification purposes only.)

MR. BADER: What is that, the same statement?

MR. BERRY: Yes.

MR. BADER: You want yours marked?

REDIRECT EXAMINATION

BY MR. BERRY:

Q Mrs. Hollander, I ask you to look at this and see if you can recognize this as an exact duplicate of the statement that Mr. Bader asked you questions about that you gave to the police department the day following the assault on you.

A (Examining.) Yes.

Q Does it accurately reflect your entire statement that you gave to them by tape?

A Yes.

Q Is that your signature on each of the three pages and your initials after each of them?

A Yes.

MR. BERRY: Your Honor, at this time the State would ask that State's Exhibit Number 2 be introduced into evidence.

MR. BADER: Your Honor, I would object and not because I think that statement is incorrect, but I would object because there's no foundation. That witness has said that she has not seen or looked at that document since the day she signed it or witnessed it, and has not reviewed it or rehearsed it. That's what she said, and Mr. Berry just asked her is that your

statement, does it accurately and completely reflect everything on the three pages. She didn't even look at them.

MR. BERRY: Mr. Bader, the Judge is up here, you're making the objection to the Judge.

MR. BADER: Well, I find there's no foundation, Your Honor, for the accuracy by this witness. I agree when we get the reporter in here, we might be able to do it, but I find it appalling that this witness could testify at this point that it accurately reflects everything she said and did on that day when she couldn't do so for me.

MR. BERRY: Your Honor --

MR. BADER: I say there's no foundation.

THE COURT: The rule is when you use part of it, only part of it, he can introduce the whole thing into evidence.

Let it come in.

MR. BERRY: Thank you, Your Honor.

(Whereupon, State's Exhibit Number 2 was admitted into evidence and marked as such.)

MR. BADER: What are we calling that now?

THE CLERK: State's Exhibit Number 2.

MR. BERRY: No further questions, Your Honor.

///

RECROSS EXAMINATION

BY MR. BADER:

Q Mrs. Hollander, having testified that this is accurate and complete and it's your statement, can you tell me whether you ever described Mr. Hayes or your assailant as being big or muscular?

MR. BERRY: Your Honor, I'm going to object at this time. It's outside the scope of direct. There's physical evidence been introduced, physical evidence speaks for itself. I have no objection if Mr. Bader wants to publish it to the jury, but the statement in its entirety, but I would object to any direct questioning of her as to the contents of it. It's introduced into evidence at this time.

THE COURT: You want to be heard, Mr. Bader?

MR. BADER: I'm sorry?

THE COURT: You want to be heard?

MR. BADER: If I get the chance, I always want to.

THE COURT: Get it on. Let's go.

MR. BADER: Yes, I wish to examine her as to --

THE COURT: No, let's hear you on this objection. That's what we're hear on.

MR. BADER: I'm not sure, I've lost track of the objection.

THE COURT: Do you have anything to say on the

ORIGINAL (6)

Supreme Court, U.S.
FILED
AUG 13 1984
ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-6766

JOE HAYES, PETITIONER

V.

STATE OF FLORIDA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE FLORIDA DISTRICT COURT OF APPEAL
FOR THE SECOND DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

JIM SMITH
ATTORNEY GENERAL

WILLIAM I. MUNSEY, JR.
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

Counsel for Respondent

BEST AVAILABLE COPY

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-6766

JOE HAYES, PETITIONER

V.

STATE OF FLORIDA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE FLORIDA DISTRICT COURT OF APPEAL
FOR THE SECOND DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

QUESTION PRESENTED

Petitioner presents the following question for review:

> Whether *DAVIS v. MISSISSIPPI*, *394 U.S. 721 (1969)*, prohibits a warrantless, non-consensual detention of a citizen, undertaken without probable cause, for the purpose of obtaining that citizen's fingerprints for comparison with prints found at the scene of a crime, and whether *TERRY v. OHIO*, *392 U.S. 1 (1968)*, may be extended to permit such detentions?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	1
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
REASON WHY THE WRIT SHOULD BE DENIED	1-4
CONCLUSION	5
APPENDIX	5 [pp 1-136]
CERTIFICATE OF SERVICE	5

TABLE OF CITATIONS

	PAGE
Davis v. Mississippi, 394 U.S. 721 (1969)	1, 2, 4
Davis v. State, 255 So.2d 916 (Miss. 1971), cert. denied, *Davis v. Mississippi*, 409 U.S. 855 (1972)	3
Hayes v. State, 439 So.2d 896 (Fla. 2d DCA 1983) reh. den. November 2, 1983, pet. for rev. den. 447 So.2d 886 (Fla. 1984)	1, 3
Terry v. Ohio, 392 U.S. 1 (1968)	1, 4
United States v. Harris, 453 F.2d 1317 (8th Cir. 1972) cert. denied, 412 U.S. 927 (1973)	4
United States v. McCarthy, 297 F.2d 183 (7th Cir. 1961) cert. denied, 369 U.S. 850 (1962)	4
United States v. Sanders, 477 F.2d 112 (5th Cir. 1973) cert. denied, 414 U.S. 870 (1973)	4
United States v. Sechrist, 640 F.2d 81 (7th Cir. 1981)	4

OPINION BELOW

The Respondent, State of Florida, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Florida Second District Court of Appeal's opinion in this case. That opinion (a copy of which is attached to the petition) is reported as *HAYES v. STATE, 439 So.2d 896 (FLA. 2d DCA 1983) reh. den. November 2, 1983, pet. for rev. den. 447 So.2d 886 (FLA. 1984).*

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition; and, Respondent does not question the jurisdictional statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent Constitutional and Statutory provisions are set forth in the petition.

STATEMENT OF THE CASE

Respondent accepts Petitioner's statement of the case.[1/]

REASON WHY THE WRIT SHOULD BE DENIED

(1) The primary guide as to whether a case merits review is set forth in Supreme Court Rule 19. Here Petitioner fails to carry his burden in demonstrating that the state court decided *HAYES* is a manner not in accord with applicable decisions of this Court. The thrust of Petitioner's argument is that the state court decided an important question of federal law which should be settled by this Court.

1/ The appendix attached hereto is the complete trial testimony of the rape victim, Julianne Hollander. References to the appendix are made by the symbol "R" followed by record pagination.

Petitioner overlooks that *DAVIS v. MISSISSIPPI, 394 U.S. 721 (1969)* was decided thirteen years ago. The question this court left open addresses the topic of a detention solely for the purpose of obtaining fingerprints:

> Detentions for the sole purpose of obtaining fingerprints are no less subject to the constraints of the Fourth Amendment. It is arguable, however, that, because of the unique nature of the fingerprinting process, such detentions might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense. See Camara v Municipal Court, 387 US 523, 18 L Ed 2d 930, 87 S Ct 1727 (1967). Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. Fingerprinting involves none of the probing into an individual's private life and throughts that marks an interrogation or search. Nor can fingerprint detention be employed repeatedly to harass any individual, since the police need only one set of each person's prints. Furthermore, fingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper line-up and the "third degree." Finally, because there is no danger of destruction of fingerprints, the limited detention need not come unexpectedly or at an inconvenient time.
>
> [394 US 728]
>
> For this same reason, the general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprinting context.
>
> We have no occasion in this case, however, to determine whether the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest.
>
> (text of 394 US at 727-728)

Significantly, the dissent of Justice Stewart came to pass:

> At the original trial the victim of the rape, under oath, positively identified the petitioner as her assailant. There now exists, therefore, ample probable cause to detain him and take his fingerprints.
>
> (id at 730)

As predicted by Justice Stewart, Davis was convicted on retrial. *DAVIS v. STATE, 255 So.2d 916 (MISS. 1971), cert. denied, DAVIS v. MISSISSIPPI, 409 U.S. 855 (1972).* In the foundation case Petitioner asserts as a basis for review, the defendant's identity would never had been known but for the unlawful arrest. The second conviction was affirmed because the victim was able to identify Davis without the use of any evidence which evolved from the unlawful arrest. In this case, Julianne Hollander (the victim: a 51 year-old bank teller), gave graphic testimony as to assailant's statements: "I want to feel your cunt" and "One scream out of you, lady, and you're dead." (R 283) Mrs. Hollander testified as to both vaginal and anal penetration. (R 283, 284) The victim made positive in-court identification of Petitioner. (R 287) So it follows in this case, as in *DAVIS v. MISSISSIPPI, supra,* a retrial would result in a second conviction. Here, the victim withstood a brutal, traumatizing cross-examination attacking her past recollection as to Petitioner's identity. Attached hereto as Appendix is a complete copy of the victim's testimony in state court.

(2) Respondent would point out that neither the decision below nor the state court record proper raises the question posed by Petitioner. Petitioner continues in his assertion that he did not effectively consent to accompany police for fingerprinting. By clear and convincing evidence the state trial court found that Petitioner accepted an invitation to accompany the detective to the police station for fingerprinting. This was a factual determination made by state court affirmed on appeal. *HAYES v. STATE, supra at 903.* Petitioner was never arrested until after a preliminary comparison of his prints and latent prints found at the crime scene indicated a match.

(3) The Florida Second District Court of Appeals has rendered a decision which does not conflict with decisions of other courts of appeal on the same matter. Judge Campbell in writing the *HAYES* opinion sets forth four cases (three of which this Court denied certiorari) which address similar situations to the instant one from which the state appellate court concluded that the fingerprints had been lawfully seized. See, *UNITED STATES v. MCCARTHY, 297 F.2d 183 (7th CIR. 1961) cert. denied, 369 U.S. 850 (1962); UNITED STATES v. SANDERS, 477 F.2d 112 (5th CIR. 1973) cert. denied, 414 U.S. 870 (1973); UNITED STATES v. HARRIS, 453 F.2d 1317 (8th CIR. 1972) cert. denied, 412 U.S. 927 (1973); and, UNITED STATES v. SECHRIST, 640 F.2d 81 (7th CIR. 1981).* These decisions leave no doubt that such a minimal intrusion on Petitioner did not infringe on his Fourth Amendment rights.

(4) It has been thirteen years since this Court left open the question posed in *DAVIS v. MISSISSIPPI, 394 U.S. 721 (1969).* To be candid, there is a real scarcity of cases where citizens are asked to consent to warrantless detentions so that their fingerprints might be lifted to be compared with those found at a crime scene. The facts are narrow; and, the holding is restricted to them. To suggest that *TERRY v. OHIO, 392 U.S. 1 (1968)* be extended to permit such detentions is logical. These narrow facts reflect such a minimal intrusion upon a citizen that there is no Fourth Amendment deprivation. However, to suggest that judicial authorization or approval be required in circumstances such as this stage of a criminal investigation would render *TERRY* a nullity. To grant certiorari jurisdiction on these narrow facts would not settle an important constitutional principle.

CONCLUSION

For the foregoing reasons in opposition, the Petition for Writ of Certiorari should be denied.

APPENDIX

[Copy of trial testimony of Julianne Hollander, the rape victim is appended hereto.]

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

WILLIAM I. MUNSEY, JR.
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

Counsel for Respondent

CERTIFICATE OF SERVICE

I, William I. Munsey, Jr., a member of the Bar of the Supreme Court of the United States and counsel of record for the State of Florida, Respondent herein, hereby certify that on August 10, 1984, pursuant to Rule 46.5, Rules of the Supreme Court, I served one copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari on Joe Hayes, Petitioner herein, by depositing such copy in the United States Post Office, Tampa, Florida, with first class postage prepaid, properly addressed to the post office address of Michael E. Raiden, Esquire, the above-named Petitioner's counsel of record, at Office of the Public Defender, Hall of Justice Building, 455 North Broadway Avenue, Bartow, Florida 33830.

All parties required to be served have been served.
Dated August 10, 1984.

WILLIAM I. MUNSEY, JR.
Assistant Attorney General
OF COUNSEL FOR RESPONDENT

Office - Supreme Court, U.S.
FILED
OCT 30 1984
L. STEVAS,
CLERK

No. 83-6766

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOE HAYES, PETITIONER,

v.

STATE OF FLORIDA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

JOINT APPENDIX

MICHAEL E. RAIDEN
Assistant Public Defender
455 North Broadway
Hall of Justice Building
Bartow, Florida 33830
(813) 533-1184
Counsel for Petitioner

WILLIAM I. MUNSEY, JR.
Assistant Attorney General
1313 Tampa Street—8th Floor
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670
Counsel for Respondent

PETITION FOR CERTIORARI FILED MAY 21, 1984.
CERTIORARI GRANTED OCTOBER 1, 1984.

TABLE OF CONTENTS

	Page
Relevant Docket Entries	ii
Proceedings in the Circuit Court for Charlotte County, Florida:	
Information (filed July 15, 1980)	1
"Motion to Dismiss Information and to Discharge Defendant and/or to Suppress Evidence" (September 24, 1980), with a handwritten notation of Circuit Judge Richard M. Stanley denying same (October 20, 1980)	4
Transcript of hearing on Motion to Suppress (October 20, 1980)	8
Judgment and sentence (October 5, 1981)	27
Proceedings in the District Court of Appeal, Second District:	
Slip opinion in *Hayes* v. *State*, 439 So.2d 896 (Fla.2d DCA 1983) (September 16, 1983) ...	32
Order denying rehearing (November 2, 1983) .	45
Order of Florida Supreme Court denying discretionary review (March 22, 1984)	46
Order of the Supreme Court of the United States Granting Motion for Leave to Proceed *in forma pauperis* and Granting Petition for Writ of Certiorari (October 1, 1984)	47

RELEVANT DOCKET ENTRIES

1. Joe Hayes was charged by information in the Circuit Court, Charlotte County, Florida, with burglary and sexual battery July 15, 1980. (R1-2)

2. Hayes moved to dismiss the information and to suppress fingerprint evidence September 24, 1980. (R25-27)

3. The motion to dismiss/suppress was denied October 20, 1980. (R116-144)

4. Hayes was tried on one count each, burglary and sexual battery, July 8-10, 1981, and a verdict of guilty was entered July 10, 1981. (R56-57, 273-742)

5. Sentence of 99 years in state prison was imposed October 5, 1981. (R62)

6. Second District Court of Appeal affirmed the judgment and sentence on September 16, 1983, and denied rehearing on November 2, 1983. *Hayes* v. *State*, 439 So.2d 896 (Fla.2d DCA 1983).

7. Florida Supreme Court denied petition for discretionary review March 22, 1984. 447 So.2d 886 (Fla. 1984).

8. The United States Supreme Court granted Hayes' Motion for Leave to Proceed *in forma pauperis* and Petition for Writ of Certiorari October 1, 1984.

IN THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA
For Charlotte County,
in the year of our Lord
One Thousand Nine Hundred and Eighty

80-156-CF-A-RMS

Information For
Count I, III, V: Burglary of dwelling
Count II, IV, VI: Sexual battery
Statute: 810.02, 794.011(5)

STATE OF FLORIDA

v.

JOE HAYES

In the name and by Authority of the State of Florida:

EUGENE C. BERRY, Assistant State Attorney of the Twentieth Judicial Circuit of the State of Florida, prosecuting for the State of Florida, in the County of Charlotte under oath information makes that JOE HAYES late of the County and State aforesaid, on the "SEE BELOW" day of "SEE BELOW" in the year of our Lord One Thousand Nine Hundred and Eighty, in the county and state aforesaid

COUNT I: did on April 27, 1980, unlawfully enter or remain in a certain dwelling, located at 401 SHREVE STREET, Punta Gorda, in the County and State aforesaid, the property of VELORA DAVIS, as owner or custodian thereof, with the intent to commit an offense therein, to-wit: ASSAULT, said dwelling being occupied by VELORA DAVIS, a human being, and said JOE HAYES did make an assault upon VELORA DAVIS, in violation of F.S. 810.02(1)(2)(A);

COUNT II: did on April 27, 1980, unlawfully commit a sexual battery upon VELORA DAVIS, 82 years of age, without said victim's consent, by vaginal and anal penetration by the sex organ of another and in the process thereof used physical force and violence not likely to cause serious personal injury, in violation of F.S. 794.011(5);

COUNT III: did on May 13, 1980, unlawfully enter or remain in a certain dwelling, located at 401 W. RETTA ESPLANADE, Punta Gorda, in the County and State aforesaid, the property of JULIANNE HOLLANDER, as owner or custodian thereof, with the intent to commit an offense therein, to-wit: ASSAULT, said dwelling being occupied by JULIANNE HOLLANDER, a human being, and said JOE HAYES did make an assault upon JULIANNE HOLLANDER, in violation of F.S. 810.02(1)(2)(a);

COUNT IV: did on May 13, 1980, unlawfully commit a sexual battery upon JULIANNE HOLLANDER, 50 years of age, without said victim's consent, by vaginal and anal penetration by the sex organ of another and in the process thereof used physical force and violence not likely to cause serious personal injury, in violation of F.S. 794.011(5);

COUNT V: did on May 18, 1980, unlawfully enter or remain in a certain dwelling, located at 140 CIRCLE DRIVE, MUNICIPAL MOBILE HOME PARK, Punta Gorda, in the County and State aforesaid, the property of HELEN SMITH, as owner or custodian thereof, with the intent to commit an offense therein, to-wit: ASSAULT, said dwelling being occupied by HELEN SMITH, a human being, and said JOE HAYES did make an assault upon HELEN SMITH, in violation of F.S. 810.02(1)(2)(a);

COUNT VI: did on May 18, 1980, unlawfully commit a sexual battery upon HELEN SMITH, 60 years of age, without said victim's consent, by vaginal penetration by the sex organ of another and in the process thereof used physical force and violence not likely to cause serious injury, in violation of F.S. 794.011(5);

Contrary to the statute in such case made and provided and against the peace and dignity of the State of Florida.

/s/ _____

Assistant State Attorney,
Twentieth Judicial Circuit
State of Florida

State of Florida
County of CHARLOTTE

Personally appeared before me, EUGENE C. BERRY, Assistant State Attorney of the Twentieth Judicial Circuit of the State of Florida, who being duly sworn, says that he files this information in good faith and certifies that he has received testimony under oath from the material witness or witnesses for the offense, and the allegations as set forth in the information, if true, would constitute the offense therein charged.

Sworn to and subscribed before me this 15th day of July, A.D. 1980

/s/ _____

SUZANNE ATKINS
Notary Public, State of Florida at Large
My Commission Expires May 31, 1983
Bonded by American Fire & Casually Company

IN THE CIRCUIT COURT OF
THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR CHARLOTTE COUNTY, FLORIDA
CRIMINAL DIVISION

Case No. 80-156-CF-A-RMS

STATE OF FLORIDA, PLAINTIFF,

v.

JOSEPH HAYES, DEFENDANT.

MOTION TO DISMISS INFORMATION AND TO DISCHARGE DEFENDANT AND/OR TO SUPPRESS EVIDENCE

COMES NOW JOSEPH HAYES, by his Court appointed lawyer, ROBERT "BOB" BADER, and pursuant to the applicable provisions of F.R.Cr.P. 3.190, moves to dismiss the Information, and/or suppress evidence, and in support thereof says:

1. That the arrest of JOSEPH HAYES on June 23rd, 1980, was without probable cause; in that, at the time of the defendant's arrest, there was insufficient evidence to identify the defendant as the perpetrator of any of the charges in this Information.

2. The facts in support of this contention are as follows:

a. There had been no positive identification of this defendant by any of the alleged victims.

b. The police relied upon information from a "confidential informant", who did not identify this defendant as being in any of the subject homes, or committing the act, but who allegedly identified the defendant as being in the area.

c. Said confidential informant is unreliable, and the testimony given does not meet any of the requirements for a confidential informant. (See Spanelli vs. United States, 393 U.S. 410) and (State vs. Wolfe, 310 S. 2nd, 729).

3. The evidence obtained from the defendant was in violation of his constitutional rights under the 4th, 5th, 6th, and 14th Amendments of the U.S. Constitution.

WHEREFORE, JOSEPH HAYES, by his Court appointed lawyer, moves to suppress the following evidence:

a. All fingerprints taken from the defendant.

b. All photographs taken of the defendant used in a "purported" photo lineup.

c. One pair of tennis shoes taken from the premises of the defendant, without a search warrant.

4. In support of this motion, this defendant says that at the time that he was taken into custody by the officers of the Punta Gorda Police Department, there was insufficient evidence to identify him as the defendant in this case, notwithstanding the suspicions of the police officers.

5. The only creditable identification which the authorities have was obtained after his illegal detention, by compelling him to submit to fingerprints, and verifying those fingerprints with alleged latent fingerprints taken at the scene of the crime and confirming their similarity. Then, and only then, did the State formally inform the defendant of his Miranda rights and charge him with the crimes set forth in this Information.

6. The facts and circumstances leading to this event are more fully set forth herein:

a. On the evening of June 23rd, 1980, without probable cause, three officers of the Punta Gorda Police Department went to the residence of the defendant, and asked him to "voluntarily" come down to the Police Station for the purpose of having his fingerprints taken, as they were (sic) investigating alleged "burglaries" in the city. When the defendant refused to voluntarily come, the officers advised the defendant that they had the authority to arrest him then and there on the crime of burglary; but if he would voluntarily come to the Police Station, they would not do so.

b. Acting in fear of his arrest, and in reliance upon the threat and the power and authority to arrest him, JOSEPH HAYES accompanied the officers in a police car to the Punta Gorda Police Station.

c. By pre-arrangement, the police officers had a Deputy Sheriff and presumed fingerprint expert available, and upon arriving at the Police Station, proceeded to finger-

print and photograph the defendant, holding him in a back room; whereupon the fingerprints thus obtained, were compared with purported latent fingerprints taken at the scene of the crime, and were identified as being the same as JOSEPH HAYES by the Deputy Sheriff.

d. Then, and only then, did the Police Officers inform the defendant he was under arrest, and inform him of his Miranda rights, including his right to counsel.

WHEREFORE, as a consequence of the illegal detention and the improper methods used in obtaining evidence against the defendant, JOSEPH HAYES, by his Court appointed attorney, moves for an Order dismissing the Information, suppressing all of the above stated evidence, and discharging the defendant, and ordering his immediate release from custody.

The undersigned makes the preceding motion under oath, and swears that the facts alleged herein are true and correct to the best of his knowledge, and are predicated upon the sworn depositions of the arresting officers, which have or will be filed herein, and requests an evidentiary hearing on this motion.

I HEREBY CERTIFY that a copy of the foregoing Motion has been hand delivered to the Assistant State Attorney, Charlotte County Courthouse, Punta Gorda, Florida, 33950, this 24th day of September, 1980.

/S/ _____

ROBERT "BOB" BADER,
Attorney for Defendant,
P.O. Box 267,
Punta Gorda, Florida, 33950,
(813) 625-4180.

STATE OF FLORIDA
COUNTY OF CHARLOTTE

BEFORE ME, the undersigned authority, appeared ROBERT "BOB" BADER, the Court appointed defense lawyer for JOSEPH HAYES, and states that the above facts and information are true and correct.

/s/ _____
SHARON K. RADFORD
Notary Public

My Commission Expires:
Notary Public, State of Florida at Large
My Commission Expires Sept. 17, 1983
Bonded by American Fire & Casualty Company

[R 116] IN THE CIRCUIT COURT OF
THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR CHARLOTTE COUNTY, FLORIDA
CRIMINAL ACTION

Case No. 80-156 CF

STATE OF FLORIDA, PLAINTIFF

v.

JOSEPH HAYES, DEFENDANT

MOTION TO DISMISS

Proceedings had and testimony taken in the above entitled cause before the Honorable RICHARD M. STANLEY, *Circuit Judge*, on Monday, October 20th, 1980.

APPEARANCES:

EUGENE BERRY, Esquire,
Assistant State Attorney,
Charlotte County Courthouse,
Punta Gorda, Florida 33950;
representing the Plaintiff.

ROBERT BADER, Esquire,
Post Office Box 267,
Punta Gorda, Florida 33950;
representing the Defendant.

[R117] MR. BADER: I would like to call—

MR. BERRY: Before we call any witnesses I would like to address the Court.

THE COURT: Let me get a Clerk so I know what we are talking about.

MR. BADER: Judge, the motion was filed back on the 24th of September and it's three (3) pages, a motion to dismiss or suppress evidence.

THE COURT: When was it filed?

MR. BADER: The 24th, Judge, it may have been stamped the 25th. I have it certified as the 24th.

THE COURT: Motion to dismiss information and to discharge and suppress evidence.

MR. BERRY: Your Honor, I would like to address the Court on the motion itself.

THE COURT: Yes.

MR. BERRY: Your Honor, from reading his motion it appears this motion is one, a motion to, standard motion to dismiss, also possible a C-4 motion to dismiss, also possible a motion to suppress, also possible a writ of habeas corpus. Your Honor, I think the motion is totally confusing, totally inappropriate. I don't think it puts me adequately on notice of what I'm here for today. Are we here for a suppression hearing? Are we here for a hearing on the prima facia evidence in regard to the case? Are we here on [R118] probable cause to arrest? I don't know, your Honor. I would ask this motion be stricken and denied and would leave Counsel to file proper motion according to the rules of procedure.

THE COURT: I'm going to deny your motion, your motion to strike, your motion to dismiss. Alright.

MR. BADER: Mr. Shoup please.

RALPH ROBERT SHOUP, JR.

A Witness herein, being first duly sworn, testified on his oath as follows:

DIRECT EXAMINATION

BY M.F. BADER:

Q. Mr. Shoup, will you give us your full name and official position?

A. Ralph Robert Shoup, Jr., Detective Sargeant, Punta Gorda Police Department.

Q. In the course of your official duties did you have occasion to investigate Joseph Hayes?

A. Yes, sir, I did.

Q. As a result of your investigation did Mr. Hayes become a suspect in a series of sexual batteries?

A. Yes, sir.

THE COURT: Hold it right there, just a minute, let [R119] me get my—you may proceed, gentlemen.

Q. (Mr. Bader continuing) Who assisted you in the investigation, Mr. Shoup?

A. Numerous individuals, Investigator Gandy, Chief of Police, Assistant Chief of Police, the State Attorney.

Q. You conferred with the State Attorney in the course of your investigation?

A. That's correct.

Q. Did there come a time when you caused Mr. Joseph Hayes to be arrested?

A. Yes.

Q. When was that date, sir?

A. I don't recall the date off hand; it was the latter part of June.

Q. If I told you it was June 23rd—

A. That's correct.

Q. And, how did you procure his arrest?

A. We had gathered information and probable cause to arrest Mr. Hayes on description, location, Court order to get the documents from the Care Center where he worked.

Q. You applied to this Court for an order to secure documents from a Care Center?

A. Investigator Gandy did.

Q. You were familiar with that order and the documents?

A. Yes.

[R120] Q. At any time did you apply to this Court for a warrant for the Defendants arrest?

A. No, sir.

Q. Do you know why you didn't apply to this Court for a warrant?

A. No, sir.

Q. Have you been advised that it was necessary or unnecessary?

A. No, sir.

Q. Well, in your discussion with the State Attorney were you not instructed or did you not inquire whether or not to apply to this Court for a warrant?

A. He didn't advise that we needed a Court Order.

Q. Now, you say you had probable cause to arrest him; can you tell me now what that evidence was to arrest him?

MR. BERRY: Your Honor, I'm going to object to that. We have already had a probable cause hearing in this matter. I think it's irrelevant. I believe the Court will find a first appearance sheet.

MR. BADER: That was after his arrest.

THE COURT: Objection sustained.

Q. (Mr. Bader continuing) Mr. Shoup, was there any eye witness identification that this Defendant is the perpetrator for any of the crimes that he's been charged with?

A. Before his arrest or after?

[R121] Q. Before.

A. No, sir.

Q. Did any informant tell you they knew of their personal knowledge that he had perpetrated any of the alleged crimes?

A. Not myself.

Q. After his detention did you take his fingerprints?

A. Yes, sir.

Q. And, as a result of those fingerprints what action did you take?

A. He was placed under arrest.

Q. How did you arrange to take his fingerprints?

A. Volunteer basis on his behalf.

Q. How do you describe the circumstances where it was voluntary?

A. We asked if he would submit his fingerprints for elimination in some burglary cases and he acknowledged that he would and he did.

Q. Did you advise him that he was under suspicion of that crime at that time?

A. Yes.

Q. Did you advise him of his Miranda rights at that time?

A. No, we didn't ask him any questions concerning—

Q. Did you inform him of his Miranda rights?

[R122] A. No, sir, I didn't.

Q. Did anyone in your presence advise him of his Miranda rights at that time?

A. No.

Q. What prior arrangements had you made concerning the taking of his fingerprints?

A. I don't understand that question.

Q. You said you went to his—where did you go to get Mr. Hayes?

A. To his house.

Q. On June 23rd?

A. Right.

Q. And, at that time did you have intention to arrest him?

A. Yes.

Q. In other words, you had already formed the conclusion that he was the perpetrator of these alleged burglaries and sexual batteries?

A. I had formed a belief.

Q. And, it was your intention to arrest him that night?

A. Yes.

Q. Is it not a fact when he refused to voluntarily come with you he was informed he would be arrested if he didn't come?

[R123] A. That he could be arrested, but he came voluntarily.

Q. After he was told he could be arrested?

A. It was in the conversation, but he voluntarily came to the station.

Q. Did he initially volunteer or did he say no I don't want to go?

A. He said he would go.

Q. He would go?

A. Yes, that's correct.

Q. He said he would go?

A. Yes.

Q. Before he was told that he would be arrested?

A. Yes.

Q. You remember my previously taking your deposition?

MR. BERRY: Excuse me, your Honor, is he trying impeach his own witness? I don't understand.

MR. BADER: I'm going to object to this.

Q. (Mr. Bader continuing) Mr. Shoup, had the fingerprints not proven to match up with those previously taken at the scene what would you have done with Mr. Hayes that evening?

A. Took him home.

Q. Would you have apologized for inconveniencing him? [R124] A. I would have thanked him for voluntarily coming down and giving his fingerprints.

Q. Then you would have sent him home?

A. I would have taken him home.

Q. Did you have a set of fingerprints prior to the night of June 23rd?

A. No.

Q. Had you inquired of various Federal Agencies to see if you could obtain them?

A. Yes.

MR. BADER: I have nothing further of this witness.

CROSS EXAMINATION

BY MR. BERRY:

Q. Deputy Shoup, prior to going down and talking to Mr. Hayes did you feel you had sufficient probable cause to arrest him for a felony?

A. Yes, sir.

Q. And, you say that he did come down there voluntarily?

A. Yes, sir.

Q. And, did you take his fingerprints?

A. Yes, sir, I did.

Q. Did you match them up?

A. I gave them to Agent Kardell who made a positive identification.

Q. And, then was formally booked in the Punta Gorda [R125] Department?

A. Yes, sir.

Q. When you were at his house, when you went up there to see him the first time, did you do any search or seizure of anything inside the house or anything of any shape or form?

A. No, he came outside.

Q. Did you ask him any incriminating questions whatsoever of any kind or nature of any type?

A. No, sir.

Q. Mr. Shoup, the fingerprints we are talking about isn't the only evidence in this case, is it?

A. No, sir.

Q. There are numerous items, is that correct?

A. That's correct.

REDIRECT EXAMINATION

BY MR. BADER:

Q. Mr. Shoup, what are the numerous items?

A. Well, we conducted a photo line-up after the arrest.

Q. That was with the picture you took at the booking procedure?

A. That's while he was sitting in the lounge.

Q. That was after his detention and arrest?

A. Well, he had just been arrested.

[R126] Q. What evidence did you have prior to the time that you got the fingerprints and photographs?

A. We had a pair of tennis shoes.

Q. Did you have those before the arrest?

A. No.

Q. I want you to tell the Judge what evidence you had that you have told the State you had numerous items of evidence, what you had prior to his arrest?

A. I had made a composite from two (2) of the victims, from their description and the composite was close to the description of Mr. Hayes, which was elimination type purpose on a composite which was enough to give us enough probable cause in that particular area that he did meet and match physical description of the suspect.

Q. Mr. Shoup, are you telling this Court that the composite you got from which of the victims?

A. Both, there was two (2) victims I got composites from.

Q. Is it your testimony to this Court that the composite you got from each victim was sufficient to conclude in your mind that Joe Hayes was the perpetrator of these offenses, just on that alone?

A. This was another piece in the puzzle.

Q. You had composites, but you want to tell the Court in your mind that composite by itself was sufficient to [R127] identify Joe Hayes?

A. Not particularly Joe Hayes.

Q. But, any white male, slim, blonde hair?

A. Brown hair.

Q. One of the composites showed him with a mustache?

A. Yes.

Q. And, the other one without a mustache?

A. Yes.

Q. One with dark hair that came over his forehead?

A. That's correct.

Q. With light, hair, shoulder length?

A. That's wrong.

Q. What did it show?

A. Brown hair—no, it was not shoulder length, just below the ears.

Q. So that there was substantial differences between the composites?

A. I don't make the composite. I do the composite from what the victim—

Q. But, between the two (2) composites there was a difference?

A. Only the mustache.

Q. What other bit of evidence did you have prior to his arrest in addition to the composite?

A. From the Care Center we had documented information [R128] as to Joe Hayes' conduct and behavior with the patients that are in the Care Center. His behavior was just another piece of the puzzle.

Q. There was evidence from the Care Center that he was a rapist?

A. No.

Q. That he had been to any of these homes on the days and nights in question?

A. No.

Q. Do you recall specifically what it was that impressed you from the Care Center report that made you think Joe was the rapist?

A. His cruel treatment towards elderly patients is what impressed me about that since most of our victims were elderly age.

Q. Any other evidence?

A. I believe that is about all that I can recall at this time.

MR. BADER: I have nothing further.

RECROSS EXAMINATION

BY MR. BERRY;

Q. I have just one quick question. You work closely with Detective Gandy?

A. That's correct.

Q. Is it true that you did work out a—that it was—[R129] there were three (3) rapes involved?

A. That's correct.

Q. They were similar in nature of what you call modus operendi?

A. Yes.

Q. Was there also a pattern designed by you as to location?

A. Yes.

Q. Was there also a pattern of house numbers and was that another piece to the puzzle in regard to Mr. Hayes?

A. We believed it was. We had the first victim was 401 Shreve Street, the second victim was 401 West Retta Esplanade Avenue, the third was 140 Circle Drive.

Q. Where did Mr. Hayes slive?

A. He lived 421 Cross Street. He worked in the 400 block at the Care Center.

Q. Four hundred (400) block of the Care Center, so this was an item of evidence involved?

A. Right.

Q. Mr. Shoup, apart from the coincidence of the 400 series of numbers how did that effect, in your mind, that Joe Hayes on the three (3) nights in question went to the various addresses and commited any crimes?

A. Mr. Bader, I don't know how it is connected, but when we had found that he lived at 421 Cross Street it was [R130] just, for some reason, it did seem coincidental, but it was something you think about, that 400 series.

Q. Did you submit that information to any psychiatrist or mathematician to see if it fit?

A. No.

Q. To get any rational basis for it?

A. No.

Q. Is that all the evidence that you had prior to his arrest?

A. The only other thing was what Investigator Gandy located at the residence of Mr. Hayes before he was arrested, which was the tennis shoes.

Q. Okay, we'll let him testify about that. I have nothing further of this witness.

MR. BERRY: I have nothing further.

THE COURT: You may step down, sir.

MICHAEL W. GANDY

A witness herein, being first duly sworn, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. BADER:

Q. Would you tell us your full name and official position please?

[R131] A. Michael W. Gandy, Investigator, Punta Gorda Police Department.

Q. In the course of your duties did you have occasion to investigate one Joseph Hayes?

A. Yes, sir.

Q. In connection with sexual batteries committed in the Punta Gorda area?

A. Yes, sir.

Q. You heard the testimony of Detective Shoup previously given in these proceedings?

A. Yes, sir.

Q. Prior to his arrest on June 23rd, you agree he was arrested on June 23rd?

A. I don't know the exact date, but if you say so.

Q. You accompanied Detective Shoup on that occasion?

A. Yes, sir.

Q. And, did you inform the Defendant that he was under suspicion of the crime of burglary?

A. Yes, sir.

Q. Did you advise him that you wanted him to come down and voluntarily give his fingerprints?

A. Yes, sir.

Q. Now, in fact you weren't investigating the burglary, but you were investigating the sexual battery?

A. I was investigating a burglary, which was prior to [R132] the battery in each case.

Q. You mean going into the house to commit the rape and made the burglary?

A. Yes, entry to commit the rape.

Q. But, each burglary was only relevant with regard to the rape that followed?

A. I don't understand the question.

Q. You separate the consequent sexual battery from the burglary and you weren't investigating the sexual battery at all this night?

A. Yes, sir, I was.

Q. You were?

A. And, the burglaries.

Q. I thought so. Alright, sir, you asked Mr. Hayes—where was he when you went to see him that night?

A. He was at his house.

Q. Did you procure a warrant?

A. Yes, sir.

Q. Had you intention of arresting him that night?

A. Yes, sir.

Q. Had you discussed the matter of procuring a warrant with your superiors or the State Attorney?

A. No.

Q. You had conferred with your superiors prior to going out there?

[133] A. Yes, sir.

Q. By pre-arrangement you had a Sheriff's Deputy to compare fingerprints?

A. Yes, sir, their expert.

Q. That was Detective Kardell?

A. Yes, sir.

Q. He was to stand by so that when you got fingerprints you could compare?

A. He was to be notified when and if Mr. Hayes was brought to the station to come down to and compare the prints. We checked to see that he would be available.

Q. You went out to his house—did you speak with Joe Hayes?

A. Yes, sir.

Q. Was Joe Hayes asked to come down and voluntarily give his prints?

A. Yes, sir.

Q. Did he accept that offer?

A. In my opinion he did, he said "No problem, I have nothing to hide" at first, when I first asked him.

Q. That's true, that's what he said, "I haven't done anything. I have nothing to hide." and what was said after that?

A. By—

Q. Do you recall previously testifying that you said, [134] "Joe, how about if we arrest you for burglary?" or "We are going to arrest you" and then Joe said, "No, don't do that, I would rather come down and give fingerprints."?

A. I did not advise him that I would arrest him, that was Investigator Shoup, I don't recall the words. This was after bits of conversation, I don't recall the exact content of the information, which Joe had started to back pedal is a good word, out of coming down to the station, and then Investigator Shoup or Detective Sgt. Shoup advised him that again something "How about if we arrest you?" or "We will

then arrest you". Joe then blurted out "No, no, I don't want to do that. I will come voluntarily."

Q. Okay, you heard Detective Shoup testify that he never made that statement?

A. Which statement?

Q. That he told Joe, when Joe started back pedaling, that if you don't come we'll arrest you?

A. No, I didn't hear him say that.

Q. You did hear Investigator Shoup tell him "If you don't come we'll arrest you"?

A. He didn't say it that way. He didn't tell Joe—he made the statement, something to the effect he would be arested or that he was going to be arrested, but he didn't threaten and say it in a threatening manner to make him come to the station.

[R135] Q. Alright, Mr. Gandy, other than the investigation following his arrest, what evidence did you have substantiating Joe Hayes identity as the perpetrator on three (3) sexual batteries?

A. Prior to his arrest?

Q. Yes, prior.

A. Joe Hayes, we had done, myself and Detective Shoup, had done numerous fingerprint checks with different subjects that Officers and us run into. I was called at my house while I was at home—

Q. Let me slow you down a minute. Did any of the victims identify Joe Hayes?

A. I was told they did, yes, sir.

Q. Prior to his arrest?

A. Not prior to his arrest.

Q. I'm speaking of only prior to his arrest?

A. Not that I know of.

Q. Did any informant tell you that he had seen Joe Hayes leaving any of the victims premises on the night in question?

A. No, sir.

Q. Was it necessary for you to tie up his fingerprints to the latent you got at the scene in order to satisfy you that he was indeed the perpetrator of these offenses?

A. Not to satisfy me, no, sir.

[R136] Q. Well, you are saying that you had sufficient evidence before you got the fingerprints to cause his arrest for these crimes, all three (3) of them?

A. Yes, sir, to satisfy me. I didn't say all three (3) at the time.

Q. What evidence did you have? I assume you had the same evidence that Mr. Shoup had?

A. Yes, sir.

Q. Four (4) street numbers?

A. Yes, sir, all victims were assaulted from the rear. I spoke with a friend.

Q. Assuming that is true—

MR. BERRY: Excuse me, I would ask that he be allowed to answer.

THE COURT: Allow him to answer.

A. Would you ask me again?

Q. (Mr. Bader continuing) Assuming all the victims had been attacked from the rear, how did that connect with Joe Hayes prior to his arrest or even afterwards?

A. He had a friend or girlfriend he was dating that he had tried to have sexual intercourse, according to her, from the rear, on many occasions.

Q. This was a sworn statement you got from somebody?

A. No, sir, an interview.

Q. And, this girl you knew?

[137] A. I didn't know personally, no, sir.

Q. I see, and that circumstance was sufficient to identify Joe Hayes as the perpetrator?

A. No, sir, not that one alone.

Q. What other circumstances did you have?

A. Again, the same as Detective Sgt. related with the 400 series and it was his bazaar behavior described by the Care Center, his apparent dislike of older female employees with the Care Center. His apparent, as described by one of the Care Center employees, his apparent dislike or his apparent fear of younger women. She had described this to me, one of the employees had. The fact that I saw a pair of herring bone design tennis shoes on his porch and that at the rape scenes there was a pair of herring bone shoe prints in all the cases. The fact that—

Q. Let's stop there a minute. These herring bone design tennis shoes, are they unique in any way?

A. No, there's a lot of them out.

Q. How many would you guess?

A. I have no idea.

Q. Hundreds?

A. I would imagine.

Q. So, there was nothing about herring bone tennis shoes that would necessarily connect Joe Hayes as the perpetrator of the particular night in question of these [R138] offenses?

A. Just the fact that he had a pair and that was the type of print we found at each scene.

Q. Mr. Gandy, are we talking about a suspicion, putting all these things together you had formed a suspicion he might be the perpetrator?

A. It was at first when it first started, but at the end I was convinced.

Q. That was after you got the fingerprints?

A. Before.

Q. Did it ever occur to you then, if you were convinced, to bring that before the Judge and ask for an arrest warrant?

A. No, sir.

Q. Did you have any reason to believe Joe Hayes was leaving town?

A. No, sir.

Q. Are you familiar with the requirement to seek from the Court a warrant for arrest when you believe there has been a crime committed by a citizen, do you know about that procedure?

A. Which one?

Q. To come before a Judge and ask him to issue a warrant to arrest somebody?

A. If I had probable cause I can make the arrest without [R139] a warrant.

Q. I see, but do you know about the procedure about coming before a Judge even with—

A. Do I know how to do it?

Q. Yes.

A. Yes.

Q. Do you know why you didn't do it in this case?

A. No, sir.

Q. Have you had a chance to know why you didn't come?

A. No, sir.

MR. BADER: I have nothing further of this witness.

MR. BERRY: No questions.

THE COURT: You may step down.

(Witness excused)

MR. BADER: Judge, I have a litany of Florida and Supreme Court Case ruling to suppress the evidence and the requirement is to obtain from the Courts a warrant before arrest. I would not burden the Court with the complete recitation of them. There are a few Florida cases that I think are important that I would like to call to the Court's attention.

One is Supreme Court Florida decision, Anderson vs. State, which is cited, your Honor, 241 So.2d

THE COURT: You got copies of it?

[R140] MR. BADER: I sure do. The pertinent paragraph is at headnote 7, your Honor.

THE COURT: 241 So.2d, 390?

MR. BADER: Headnote paragraph 7 is the one that cites with approval the authority that I will ultimately get to.

THE COURT: Okay.

MR. BADER: I would cite, your Honor, Shepherd vs. State at 343, So.2d, page 1390. Here the First District Court of Florida states that a warrantless search must be based on probable cause and on sufficient circumstances to excuse the failure to obtain a warrant. I have marked the pertinent parts of the decision for your Honor's review.

THE COURT: Wait just one second.

(off the record)

THE COURT: I might point out where I went. I got a copy, which you furnished me of Anderson vs. State.

MR. BADER: That's the only paragraph, Judge.

THE COURT: But, it doesn't include everything in the case. There are other parts that go into that case.

MR. BADER: Well, that's the only part—

THE COURT: Yes, sir, but I like to look. I want to know what circumstances it is, what and why. Why not just bring me the one paragraph?

MR. BADER: When I finish my argument it will be [R141] connected. I could have brought only the part the Supreme Court of Florida recognized, the doctrine of Davis vs. Mississippi case and it has been upheld and cited with approval by other Florida Courts and then I'll get to the Kensler vs. Florida, your Honor, 360, Southern Reporter at page 24. The Second District, which is our Appelate Division cites with approval and dismisses and reverses a conviction based upon fingerprints taken by the Police where they were taken before he was arrested and without probable cause, violating his First Amendment protection and cites again Davis vs. Mississippi and the Anderson case.

That's all I'm doing, is what they get down to say is what the Supreme Court said in the Davis vs. Mississippi case, which I cite to your Honor as being 394, United States 721, a decision in which the Supreme Court of Mississippi confirming a conviction based on fingerprints taken from a negro male, rape of an older woman, were suppressed. The conviction was reversed and the fingerprints suppressed by the Supreme Court. It is this decision that Anderson acknowledged, the Supreme Court of Florida, in which this District Court of Appeals cites with approval in the Kensler case. That was the only reason I cited Anderson and Kensler.

It is the Davis case, that is the pertinent one, Judge. I would also cite to you the decision of the Fourth District, [R142] State of Florida vs. Hinton, 305, Southern Reporter page 804, which states that in a warrantless search the burden, once the fact the search was warrantless, shifts to the State and the Defendant need do nothing more but assert the warrantlessness of the search. And, in that case neither the State nor the Defendant put on any testimony, but merely referred to the Court file, which failed to disclose that a warrant had been obtained. In the absence of having

obtained a warrant the Court said that the burden shifts to the State to prove that the arrest or search were valid and that the evidence, not having done so, the motion was granted.

I give that to you, your Honor,

Again, in the First District Court, cited Shepherd vs. State, 343, So.2d, 1349, warrantless search must be based on probable cause and on sufficient exigent circumstances to excuse the failure to obtain a warrant. And, in that case the Court, speaking very specifically to the kind of facts we have in this case, the burden rests on the State to demonstrate that the warrantless search of the person—that a warrantless search must be based on probable cause and on sufficient exigent circumstances to excuse the failure to obtain a warrant. Even if the Officer had probable cause to believe evidence of a crime was contained in the billfold, this was a search of a billfold, [R143] and there was no exigent circumstances to excuse the Officer for applying for a search warrant. Even if it was sufficient to justify, if the evidence was sufficient to justify the issuance of a warrant, nothing excused the Officer from the requirement of waiting to conduct the search until the warrant issued.

So that what the Courts have consistently, from our Florida Court to the Supreme Court, as that if the State in the development of it's investigation developes sufficient evidence to warrant the arrest of the Defendant, it must apply first to the Court where an objective, impartial Officer will have an opportunity to review the evidence and put his judicial approval on the act of the Police, otherwise the Fourth Amendment becomes meaningless, if each Officer can make up his own mind as to what is probable cause, then we don't need warrants, we don't need Chapter 301 or the Fourth Amendment, because every Officer will decide that he has got probable cause. The test is whether an impartial judicial officer would agree with them. And, here I think the evidence clearly shows that they had a lot of suspicions, but they needed those fingerprints, but they went to Joe's house and had the intent as their deposition shows, which are on file in this record, they were going to arrest him that night one way or the other for these crimes with-

out ever coming before you, in violation [R144] of Four (4), Six (6), and Fourteenth (14) Amendment to the Constitution as more fully set forth in the Davis case.

THE COURT: What say the State?

MR. BERRY: I believe the facts presented before the Court sufficiently show the Officers had probable cause for the Defendant prior to the taking of fingerprints. I think that, further, the evidence before this Court is what he did, voluntarily go down there, they took his fingerprints and arrested him, there was no total facts before the Court. There was absolutely no search of any dwelling involved. They said they didn't even go in. What we are talking about is probable cause to arrest on a felony. The law of Florida clearly states if an Office had probable cause to arrest on a felony he has that authority. I think they properly exercised their authority. They did not secure a search warrant. They weren't searching any building or personal effects. I think that the motion as filed before the Court should be denied.

THE COURT: Alright, on the basis of the testimony before the Court the motion incorporated all portions thereof is denied. So be it. (Hearing concluded)

EDITOR'S NOTE

PAGES 27 thru 31 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

PROBATION VIOLATOR
(Check if Applicable)

IN THE CIRCUIT COURT, TWENTIETH JUDICIAL CIRCUIT, IN AND FOR CHARLOTTE COUNTY, FLORIDA

DIVISION CIRCUIT-FELONY

CASE NUMBER 80-156-CF-A-RMS

STATE OF FLORIDA

-vs-

JOE HAYES
Defendant

JUDGMENT

The Defendant, JOE HAYES, being personally before this Court represented by ROBERT "BOB" BADER, COURT APPOINTED, his attorney of record, and having:

(Check if Applicable)

- [X] Been tried and found guilty of the following crime(s)
- [ ] Entered a plea of guilty of the following crime(s)
- [ ] Entered a plea of nolo contendere to the following crime(s)

COUNT	CRIME	OFFENSE STATUTE NUMBER(S)	DEGREE OF CRIME	CASE NUMBER
3	BURGLARY OF DWELLING	810.02(2)(1)(2)(a)	LIFE	80-156-CF-A-
4	SEXUAL BATTERY	794.011(5)	SECOND	80-156-CF-A-

Cause having been shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the defendant is hereby ADJUDICATED GUILTY of the above crime(s).

****

The Defendant is hereby ordered to pay the sum of ten dollars ($10.00) pursuant to F.S. 960.20 (Crimes Compensation Trust Fund). The Defendant is further ordered to pay the sum of two dollars ($2.00) as a court cost pursuant to F.S. 943.25(4).

(Check if Applicable)

- [ ] The Defendant is further ordered to pay an additional two ($2.00) pursuant F.S. 943.25(8) (This provision is optional; not applicable unless checked).
- [ ] The Court hereby imposes a fine in the sum of $_____

NOTE: *This page is to be completed ONLY where sentence is stayed and withheld or deferred until a later date.*

Imposition of Sentence Stayed and Withheld *(Check if Applicable)*

☐ The Court hereby stays and withholds the imposition of sentence and places the defendant on probation for a period of _____ under the supervision of the Department of Corrections (conditions of probation set forth in separate order).

Sentence Deferred *(Check if Applicable)*

☐ The Court hereby defers imposition of sentence until _____ (date)

The Defendant in Open Court was advised of his right to appeal from this Judgment by filing notice of appeal within thirty days from this date with the Clerk of this Court, and the Defendant[s entitlement to the assistance of counsel in taking said appeal at the expense of the State upon showin of indigency.

FINGERPRINTS OF DEFENDANT

1. R. Thumb	2. R. Index	3. R. Middle	4. R. Ring	5. R. Little
6. L. Thumb	7. L. Index	8. L. Middle	9. L. Ring	10. L. Little

Fingerprints taken by:

_____
Name and Title

DONE AND ORDERED in Open Court at _____ County, Florida, this _____ day of _____ A.D., 19____. I HEREBY CERTIFY that the above and foregoing fingerprints are the fingerprints of the Defendant, _____ and that they were placed thereon by said Defendant in my presence in Open Court this date.

_____
JUDGE

Defendant JOE HAYES

Case Number 80-156-CF-A-PMS

SENTENCE

(As to Count)

The Defendant, having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by Law, and no cause being shown,

(Check either provision if applicable)

☐ and the Court having on _____ (date) deferred imposition of sentence until this date.

☐ and the Court having placed the Defendant on probation and having subsequently revoked the Defendant's probation by separate order entered herein,

IT IS THE SENTENCE OF THE LAW that the Defendant be committed to the custody of:

XXXX The Department of Corrections of the State of Florida, or

☐ The Sheriff* of _____ County, Florida

*(Name of Local Corrections Authority to be inserted at printing if other than Sheriff)

To be imprisoned (check one; unmarked sections are inapplicable)

☐ For a term of Natural Life

XXXX For a term of NINETY NINE (99) YEARS

☐ For an indeterminate period of 6 months to _____ years.

If "split" sentence complete either of these 2 paragraphs

☐ Followed by a period of _____ on probation under the supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

☐ However, after serving a period of _____ imprisonment in _____ the balance of such sentence shall be suspended and the defendant shall be placed on probation for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

•••••• SPECIAL PROVISIONS ••••••

By appropriate notation, the following provisions apply to the sentence imposed in this section:

Firearm—3 year mandatory minimum

☐ It is further ordered that the 3 year minimum provisions of 775.087(2) are hereby imposed for the sentence specified in this count, as the defendant possessed a firearm.

Drug Trafficking—mandatory minimum

☐ It is further ordered that the _____ year minimum provisions of 893.135(1)( )( ) are hereby imposed for the sentence specified in this count.

Retention of Jurisdiction

XXX The Court pursuant to F.S. 947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for the period of 33 years. The requisite findings by the Court are set forth in a separate order or stated on the record in open court.

Habitual Offender

☐ The defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S. 775.084(4)(a). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

Jail Credit

XXX It is further ordered that the Defendant shall be allowed a total of 467 credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration (optional):

Consecutive/Concurrent

It is further ordered that the sentence imposed for this count shall run ☐ consecutive ☐ concurrent (check one) to the sentence set forth in count _____ above.

Defendant JOE HAYES

Case Number 80-156-CE-A-PMC

SENTENCE

(As to Count II)

The Defendant, having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by Law, and no cause being shown.

(Check either provision if applicable)

☐ and the Court having on _____ (date) deferred imposition of sentence until this date.

☐ and the Court having placed the Defendant on probation and having subsequently revoked the Defendant's probation by separate order entered herein,

IT IS THE SENTENCE OF THE LAW that the Defendant be committed to the custody of:

☐ The Department of Corrections of the State of Florida, or
☐ The Sheriff* of _____ County, Florida
*(Name of Local Corrections Authority to be inserted at printing if other than Sheriff)

To be imprisoned (check one, unmarked sections are inapplicable)

☐ For a term of Natural Life
☐ For a term of _____
☐ For an indeterminate period of 6 months to _____ years.

If "split" sentence complete either of these 2 paragraphs

☐ Followed by a period of _____ on probation under the supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

☐ However, after serving a period of _____ imprisonment in _____ the balance of such sentence shall be suspended and the defendant shall be placed on probation for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

•••••• SPECIAL PROVISIONS ••••••

By appropriate notation, the following provisions apply to the sentence imposed in this section:

Firearm—3 year mandatory minimum

☐ It is further ordered that the 3 year minimum provisions of 775.087(2) are hereby imposed for the sentence specified in this count, as the defendant possessed a firearm.

Drug Trafficking—mandatory minimum

☐ It is further ordered that the _____ year minimum provisions of 893.135(1)( )( ) are hereby imposed for the sentence specified in this count.

Retention of Jurisdiction

☐ The Court pursuant to F.S. 947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for the period of _____. The requisite findings by the Court are set forth in a separate order or stated on the record in open court.

Habitual Offender

☐ The defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S. 775.084(4)(a). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

Jail Credit

☐ It is further ordered that the Defendant shall be allowed a total of _____ credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration (optional):

Consecutive/Concurrent

It is further ordered that the sentence imposed for this count shall run ☐ consecutive ☐ concurrent (check one) to the sentence set forth in count _____ above.

Defendant JOE HAYES

Case Number 80-156-CF-A-RMG

(Concurrent/Consecutive as to other convictions)

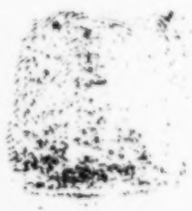
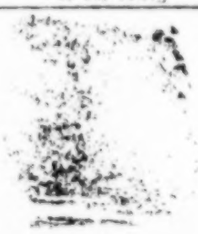
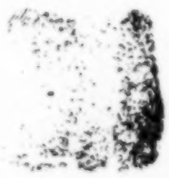
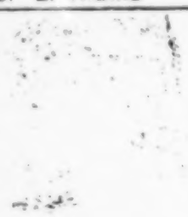
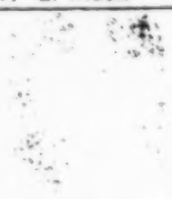
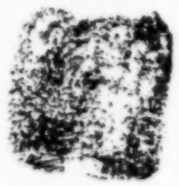
☐ It is further ordered that the composite term of all sentences imposed for the counts specified in this Order shall run ☐ consecutive or ☐ concurrent (check one) to any active sentence currently being served by the Defendant

In the event the above sentence is to the Department of Corrections, the Sheriff of CHARLOTTE County, Florida is hereby ordered and directed to deliver the Defendant to the Department of Corrections together with a copy of this Judgement and Sentence.

The Defendant in Open Court was advised of his right to appeal from this Judgment by filing notice of appeal within thirty days from this date with the Clerk of this Court, and the Defendant's entitlement to the assistance of counsel in taking said appeal at the expense of the State upon showin of indigency.

In imposing the above sentence, the Court further recommends (SEE ATTACHED ORDER)

FINGERPRINTS OF DEFENDANT

1. R. Thumb	2. R. Index	3. R. Middle	4. R. Ring	5. R. Little
				
6. L. Thumb	7. L. Index	8. L. Middle	9. L. Ring	10. L. Little
				

Fingerprints taken by:

LT. JOHN DAVENPORT: CHIEF JAILER-CCSO
Name and Title

DONE AND ORDERED in Open Court at CHARLOTTE County, Florida, this 5th day of OCTOBER, A.D., 19 81. I HEREBY CERTIFY that the above and foregoing fingerprints are the fingerprints of the Defendant, JOE HAYES and that they were placed thereon by said Defendant in my presence in Open Court this date.

James R. Adams
CIRCUIT JUDGE
HONORABLE JAMES R. ADAMS

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

CASE NO. 82-436

JOE HAYES, APPELLANT,

v.

STATE OF FLORIDA, APPELLEE.

Opinion filed September 16, 1983.

Appeal from the Circuit Court for Charlotte County;
James R. Adams, Judge.

Jerry Hill, Public Defender,
and Michael E. Raiden, Assistant Public Defender,
Bartow, for Appellant.

Jim Smith, Attorney General, Tallahassee,
and William I. Munsey, Jr., Assistant Attorney General,
Tampa, for Appellee.

CAMPBELL, *Acting Chief Judge.*

Joe Hayes appeals his convictions for burglary and sexual battery. He challenges the admission into evidence at his trial of fingerprints taken from him during a police investigation and of tennis shoes removed from the front porch of his home during the course of that same investigation. We find no error, and we affirm.

Early on the morning of May 13, 1980, a man entered the victim's home and raped her. When the man left, she called the police, and when the officers arrived, they found latent fingerprints on the doorknob of the victim's bedroom door.

The police also found a herringbone pattern tennis shoe print on the east side of the victim's front porch.

The police continued investigating this case for the next several weeks, and with the help of the victim, they prepared a composite drawing of the assailant that yielded the following description: A slender, white male with short brown hair. The police officers conducted field interviews with thirty to forty men who generally fit that description. One of the men interviewed was appellant.

Gradually, appellant emerged as a possible suspect in this and several other sexual battery cases, and so Detectives Shoup and Brady, along with the assistant police chief of Punta Gorda, went to appellant's home to obtain his fingerprints. They intended to compare these prints with the latent prints lifted from the victim's home. A search warrant was not obtained prior to going to appellant's home.

Detective Shoup later testified that they only wanted to obtain appellant's fingerprints, but he added that they were prepared to arrest appellant if he refused to cooperate because they believed they already had sufficient probable cause to do so. The officers never entered appellant's home but talked to him on his front porch. He said he would rather go with the officers to the station than be arrested. It is, therefore, at best, highly questionable that appellant's accompanying the officers to the station could be considered voluntary. While the officers stood on the front porch, they also noticed a pair of herringbone pattern tennis shoes lying on the front porch.

Appellant went to the station with the officers and allowed them to take his fingerprints. When the police compared these prints with the latent prints removed from the crime scene, they found that the prints matched, and appellant was thereafter arrested for and later charged with burglary and sexual battery.

Appellant sought, both before and during trial, to suppress the fingerprints and tennis shoes seized during the police investigation. The trial judge refused to suppress these articles of evidence, and the jury eventually found appellant guilty as charged.

Initially, we note that even though the officers did not have a warrant, *Payton* v. *New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), does not apply here since the discussion about fingerprints and the seizure of the tennis shoes occurred on the front porch of appellant's home. Because the officers found the shoes on appellant's front porch, the trial court did not err in admitting the shoes into evidence. *State* v. *Rickard*, 420 So.2d 303 (Fla. 1982), demonstrates that these shoes clearly were not in a constitutionally protected area at the time the officers saw them and so were subject to seizure.

We move then to a consideration of the stop of appellant and the seizure of his fingerprints, and we begin and end with an examination of the fourth amendment. Generally, to be valid under the fourth amendment, a search and seizure should be made only pursuant to a warrant that is based upon probable cause. In fact, a warrantless search is per se invalid unless it falls within one of the carefully defined exceptions to the warrant requirement. *Engle* v. *State*, 392 So.2d 245 (Fla. 5th DCA 1980); *Ulesky* v. *State*, 379 So.2d 121 (Fla. 5th DCA 1979).

However, law enforcement officials frequently make a determination of probable cause, based upon the facts before them, that is later judicially sustained. Here, the police officers believed they had probable cause sufficient to arrest appellant before they obtained his fingerprints. However, we conclude that the officers did not have probable cause at that point in the investigation. The officers were seeking an intended, investigatory confrontation, an encounter in which law enforcement officials frequently engage. Such confrontations may occur in the context of preventing a crime from occurring, or, as here, where officers are involved in an ongoing investigation in an effort to solve a particular crime. At the time the officers approached appellant's home, they had only the partial description given in the composite drawing to guide them and the knowledge that appellant was evidently a suspect in some other sexual batteries. These factors were alone insufficient to give the officers probable cause to arrest appellant. Since they did not have probable cause to arrest appellant, we must deter-

mine whether appellant's encounter with the police may be lawfully explained in another manner. To answer this question, we still must examine the fourth amendment because clearly the strictures of that amendment apply during the investigatory as well as the accusatory or arrest stage of the criminal process. *Dunaway* v. *New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). However, to resolve this issue, we must examine that amendment from another perspective.

Not all searches and seizures are invalid simply because probable cause is lacking. In *Terry* v. *Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the United States Supreme Court upheld a policeman's stop and frisk of a person whom he suspected of being involved in criminal activity. In reaching its conclusion, the Court set out a very limited context in which the probable cause requirement of the fourth amendment does not apply. The focus for the Court in *Terry* and the focus which we follow here is whether the official governmental intrusion was reasonable. This focus is dictated by the very language of the amendment because it is beyond peradventure that the fouth amendment protects citizens from *un*reasonable searches and seizures, not *all* searches and seizues. *Terry; Elkins* v. *United States*, 364 U.S. 206, 80 S.Ct. 1467, 4 L.Ed.2d 1669 (1960); *Gaskins* v. *State*, 89 So.2d 867 (Fla. 1956); *State* v. *White*, 312 So.2d 475 (Fla. 4th DCA 1975); *Gilbert* v. *State*, 289 So.2d 475 (Fla. 1st DCA), *cert. denied*, 294 So.2d 660 (Fla. 1974); *Welester* v. *State*, 201 So.2d 789 (Fla. 4th DCA 1967). And when the probable cause requirement of the fourth amendment is not implicated in the facts of a particular case, courts must then examine all the attendant facts and circumstances involved to determine whether that governmental intrusion was reasonable for fourth amendment purposes. *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); *Longo* v. *State*, 157 Fla. 668, 26 So.2d 818 (1946); *Starks* v. *State*, 108 So.2d 788 (Fla.2d DCA 1959). In undertaking this examination, a court must compare and then balance the competing interests involved. *Brignoni-Ponce; Terry; Camara* v. *Munici-*

pal Court, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967).

The public, and through it the police, has an understandably strong interest in effective detection and prevention of crime. As the Court stated in *Terry*, "it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an approprite manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause of arrest." 392 U.S. at 22, 88 S.Ct. at ____, 20 L.Ed.2d at 906. This legitimate interest must be balanced in turn with the individual's interest in being free from unjustified, humiliating physical intrusions as well as against his overall interest in privacy. In making this inquiry under the fourth amendment, courts must be cognizant that the analysis must proceed at two different levels. First, there must be a seizure of the individual by law enforcement officials. Then, there must be a search for and a seizure of evidence. *United States* v. *Dionisio*, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973).

Appellant clearly was seized for purposes of the fourth amendment when the officers accosted him on his front porch and asked for his fingerprints. Because this was the sole reason for this intended investigative confrontation and because no interrogation occurred, we conclude that under the narrow circumstances of this case, this was a reasonable seizure or detention of appellant under the fourth amendment.

It does not matter that the officers had to take appellant to the police station to actually obtain his prints. Whether the prints were taken at the station or on appellant's front porch is immaterial. *State* v. *Merklein*, 388 So.2d 218 (Fla. 2d DCA 1980), *petition for review denied*, 372 So.2d 1377 (Fla. 1981), illustrates why this is so. There, sheriff's deputies were responding to an attempted robbery that occurred on Siesta Key. One deputy broadcast a BOLO describing the getaway car and the two suspects inside. Other deputies covered the bridges leading to the mainland and stopped several vehicles that fit the description in the BOLO. The defendant and his companion were stopped,

and then they were held until another deputy could transport the victim and the witnesses to the scene for purposes of identification. This court found that this was a reasonable detention. "It is permissible to detain suspects for a reasonable time to investigate the circumstances warranting an investigatory stop as well as any suspicious circumstances produced by the stop." 388 So.2d at 219.

Like the detention in *Merklein*, the detention here occurred during the investigatory stage of the criminal process. In these circumstances, it does not matter who is moved, the victim or the suspect. By way of analogy and in support of the view we follow here, it should be noted that in *Pardo* v. *State*, No. 82-52 (Fla. 5th DCA Apr. 20, 1983), the defendant was removed from the scene of an accident, taken to a hospital, and there had a blood specimen taken from him. The specimen was later used against him in his trial for manslaughter while driving intoxicated. The movement to the hospital prior to taking the blood specimen did not render the specimen inadmissible at trial. Where there is a reasonable suspicion sufficient to justify a stop or detention, it is permissible to stop or detain an individual reasonably long enough to allay or confirm suspicions so as to cause either release or arest of that individual. This principle applies here because if it is reasonable to take a suspect to a hospital for a blood test to obtain evidence in regard to a manslaughter charge, it seems to us it is also reasonable to take a suspect in a rape case to the police station to obtain fingerprint comparisons.

Since we conclude that appellant was lawfully detained, or seized for purposes of the fourth amendment, we move to the next level to determine whether the taking of appellant's fingerprints was likewise a reasonable search and seizure under the fourth amendment.

In *Davis* v. *Mississippi*, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969), the United States Supreme Court held that fingerprints obtained from the petitioner in that case had been seized during a detention violative of the fourth and fourteenth amendments. The petitioner was one of twenty-four black youths taken to police headquarters during an investigation in a rape case. The victim had de-

scribed her assailant only as a young black male. During the detention, the youths, including the petitioner, were fingerprinted, *questioned*, and released. The petitioner was detained again a few days later, jailed, given a lie detector test, and fingerprinted again. The Court reversed, noting that there had been "no attempt ... to employ procedures which might comply with the requirements of the Fourth Amendment." 394 U.S. at 728, 89 S.Ct. at ____, 22 L.Ed.2d at 681. Although not necessary to the decision in *Davis*, the Court addressed the question of a detention *solely* for the purpose of obtaining fingerprints:

> Detentions for the sole purpose of obtaining fingerprints are no less subject to the constraints of the Fourth Amendment. It is arguable, however, that, because of the unique nature of the fingerprinting process, such detentions might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense. See *Camara* v. *Municipal Court*, 387 US 523, 18 L.Ed.2d 930, 87 S.Ct. 1727 (1967). Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search. Nor can fingerprint detention be employed repeatedly to harass any individual, since the police need only one set of each person's prints. Furthermore, fingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper line-up and the "third degree." Finally, because there is no danger of destruction of fingerprints, the limited detention need not come unexpectedly or at an inconvenient time. For this same reason, the general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprinting context.
>
> We have no occasion in this case, however, to determine whether the requirements of the Fourth Amendment could be met by narrowly circumscribed proce-

> dures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest.

394 U.S. at 727-28, 89 S.Ct. at ____, 22 L.Ed.2d at 681. The Court in *Davis* did not need to decide that question because, under the facts of that case, it was unnecessary to do so. The Court ruled that the fingerprint evidence was inadmissible explicitly because the police officers *interrogated* the petitioner in addition to merely taking his fingerprints.

The instant case poses the very question left unanswered by the Court in *Davis*, and we note that this issue has not been directly addressed since the *Davis* decision. *See United States* v. *Thomann*, 609 F.2d 560 (1st Cir. 1979). Our study of *Davis* and its progeny has revealed that the precise holding of *Davis*, which we have just described, as well as the meaning and import of that decision, has been misconstrued. *See Bacon* v. *United States*, 449 F.2d 933 (9th Cir. 1971). *See also Hamrick* v. *Wainwright*, 465 F.2d 940 (5th Cir. 1972). For example, in *Dunaway* v. *New York*, the Court, while again asserting the notion that it is permissible under certain circumstances to take fingerprints absent probable cause, seemed to imply in an earlier paragraph of the same opinion that it had rejected that very argument in *Davis*.

Of course, the Court did not reject that argument in *Davis*, and in any event, the facts in *Dunaway* in no way involved or concerned the taking of a suspect's fingerprints during the course of an ongoing criminal investigation. There, the police, during the course of a murder investigation, took the petitioner to the station, placed him in an interrogation room, gave him *Miranda*[1] warnings, and questioned him. He was never told he was under arrest, and the officers did not obtain a warrant because they did not believe they had probable cause. Eventually, he made an incriminating statement which was later determined to be the fruit of an illegal detention. Thus, *Dunaway* is inapposite to the instant case, except insofar as it stands for the

---

[1] *Miranda* v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

proposition we earlier stated; the fourth amendment applies to the investigatory as well as the accusatory stage of the criminal process.

Our state courts have also touched on the issue before us on occasion; however, each case is factually distinguishable and, therefore, inapplicable to the instant case. In *Anderson* v. *State*, 241 So.2d 390 (Fla. 1970), *vacated*, 408 U.S. 938, 92 S.Ct. 2868, 33 L.Ed.2d 758 (1972),[2] the defendant ws arrested and fingerprinted and later obtained counsel. Later, the police took his palmprint without advising him of his rights. The court held that this action did not violate the defendant's right to be free from self-incrimination. Citing *Davis*, and apparently misconstruing it, the court in dicta indicated that taking the fingerprints of a suspect before arrest and without probable cause was violative of the fourth amendment. However, as we have indicated, *Davis*, in fact, left open that precise question, and so the language in *Anderson*, being dicta by which we are not bound, does not prevent us from reaching and deciding that question. Years ago, Mr. Justice Whitfield explained why this is so:

> It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit where the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated. It cannot be reasonably expected that every word, phrase or sentence contained in a judicial opinion will be so perfect and complete in comprehension and limitation that it may not be improperly employed by wresting it from

---

[2] The case was vacated "insofar as it leaves undisturbed the death penalty imposed. . . ." 408 U.S. at 845, 92 S.Ct. at 2845, 33 L.Ed.2d at 744. *See Stewart* v. *Massachusetts*, 408 U.S. 845, 92 S.Ct. 2845, 33 L.Ed.2d 744 (1972).

> its surroundings, disregarding its context and the change of facts to which it is sought to be applied, as nothing short of an infinite mind could possibly accomplish such a result. Therefore, in applying cases which have been decided, what may have been said in an opinion should be confined to and limited by the facts of the case under consideration when the expressions relied upon were made, and should not be extended to cases where the facts are essentially different. When this rule is followed, much of the misapprehension and uncertainty that often arise as to the effect of a decision will be practically avoided.
>
> What is said in an opinion upon a point not raised or properly involved cannot control in a subsequent case whee the very point is presented for decision. *Union Tank Line Co.* v. *Wright*, 249 U.S. 275, 39 Sup.Ct.Rep. 276. General words used in a judicial opinion should be construed with such limitation as are required by a refernce (sic) to the facts in the case.

Ex Parte: Ernest Amos, 93 Fla. 5, 20-22, 112 So. 289, 294-95 (1927) (en banc) (Whitfield, J., concurring) (citations omitted). This old and well established judicial principle is still valid and has been consistently applied. *Ard* v. *Ard*, 395 So.2d 586 (Fla. 1st DCA 1981); *Bunn* v. *Bunn*, 311 So.2d 387 (Fla. 4th DCA 1975); *Weisenberg* v. *Carlton*, 233 So.2d 659 (Fla. 2d DCA), *cert. denied*, 240 So.2d 643 (Fla. 1970); *Booth* v. *Mary Carter Paint Co.*, 182 So.2d 292 (Fla. 2d DCA 1966).

In *Kinsler* v. *State*, 360 So.2d 24 (Fla. 2d DCA 1978), the defendant allowed police officers to take a footprint impression from him, and this court, relying on *Davis* and the *Anderson* dicta, found that this action violated the defendant's fourth amendment rights. However, there, a key factor for the court was the defendant's status as a parolee and his parole officer's statement that if he refused to submit he would be in violation of his parole. Notwithstanding, to the extent that *Kinsler* followed the dicta in *Anderson* which sprang from an erroneous application of *Davis*, we hereby recede from that portion of our *Kinsler* decision.

There are a number of cases that address situations similar to the one presented here, and having examined these

cases, we conclude that the fingerprints were properly seized and, therefore, properly admitted into evidence against appellant.

In *United States* v. *McCarthy*, 297 F.2d 183 (7th Cir. 1961), *cert. denied*, 369 U.S. 850, 82 S.Ct. 933, 8 L.Ed.2d 9 (1962), the court affirmed McCarthy's bank robbery conviction. He argued that prints taken from him by an F.B.I. agent who persuaded him to go downtown and give his prints should be suppressed because they had been seized in violation of the fourth amendment. The court, in affirming, held otherwise, and this case seems to represent the clearest example of the situation left open in *Davis*, aside from the one presented here. Cases decided after *Davis* that have touched on this issue and similar ones dealing with physical evidence have also allowed such evidence to be admitted.

In *United States* v. *Sanders*, 477 F.2d 112 (5th Cir.), *cert. denied*, 414 U.S. 870, 94 S.Ct. 88, 38 L.Ed.2d 88 (1973), the court affirmed the admission into evidence of palmprints taken from Sanders. The court noted that at the time the palmprints were taken, Sanders was lawfully in custody on another unrelated matter. Appellant was likewise lawfully seized. As far as the actual taking of the palmprints, the court concluded that taking palmprints, like the taking of fingerprints here, is much less intrusive than an interrogation or a full-blown search of the person.

In *United States* v. *Harris*, 453 F.2d 1317 (8th Cir. 1972), *cert. denied*, 412 U.S. 927, 93 S.Ct. 2755, 37 L.Ed.2d 154 (1973), the court found no error in the admission of handwriting exemplars given by the defendant. The defendant there was a suspect in a case involving the theft of a check which he had endorsed. Some postal inspectors visited Harris in his home and in the presence of his parents informed him of the ongoing investigation and asked him for his handwriting sample. The court found that the postal inspectors' conduct was reasonable because Harris was never under any type of pressure, coercion or duress. The court stated with reference to the inspectors' conduct that "it appears to be the most logical and reasonable course of conduct to pursue." 453 F.2d at 1321. Likewise

here, the officers, in attempting to solve a serious crime, tried to tie up the strongest lead they had, fingerprints, with a suspect.

In *United States* v. *Seacrest*, 640 F.2d 81 (7th Cir. 1981), the court affirmed the earlier denial of Seacrest's motion to suppress his fingerprint evidence. The court noted that like the defendant in *Sanders*, Seacrest was lawfully in custody on another matter at the time his fingerprints were taken. Since he was, therefore, lawfully seized for fourth amendment purposes, like appellant here, the court examined only the taking of the fingerprints from Seacrest and concluded that the process was so minimally intrusive that it was wholly reliable and, therefore, did not violate the fourth amendment.

Therefore, it is clear from *McCarthy*, *Harris*, *Sanders* and *Seacrest* that such a minimal intrusion upon appellant in this case did not infringe any of his fourth amendment rights. Though he was not in legal *custody*, he was lawfully and reasonably "seized" for purposes of the fourth amendment. This seems to us a logical extension of *Terry*. Unlike the petitioner in *Davis*, there is no evidence that he was subjected to interrogation.

Finally, we note that in *McCarthy*, *Harris* and *Sanders*, the courts did not require that there be judicial approval or authorization prior to obtaining prints or handwriting samples. Neither do we conclude that there should be such intervention for we do not deal here with a question of probable cause. Requiring this type of judicial intervention at this stage of a criminal investigation would unnecessarily hamper efforts both to prevent and to solve crimes. Carried to its logical extreme, such a rule would render *Terry* a complete nullity.

It would appeal by implication from *Davis* and many other cases that had the officers arrested appellant under a mistaken belief that they had probable cause, taken him to the station, booked him, fingerprinted him, and nothing more, the fingerprints would be admissible in evidence even though the arrest was later invalidated. Thus, it would seem that where, as here, appellant was not arrested, there was no probable cause but only a reasonable

suspicion of criminal activity, and where appellant was, without force being used, persuaded or even coerced into going with the officers and giving his fingerprints, and nothing more, those prints would also be admissible.

However, this decision should not in any way be construed as giving law enforcement officers carte blanche to fingerprint every person suspected of committing a crime currently under investigation. We hold only that under the narrow facts of this case, the government's legitimate interest in law enforcement, specifically, the solving of a violent crime, outweighed appellant's interest in privacy as defined by the fourth amendment.[3] The initial seizure of appellant was reasonable as was the seizure of his fingerprints. As we have earlier stated, the seizure of the tennis shoes presents no fourth amendment problems.

We have examined the remaining points on appeal, and we find them to be without merit.

AFFIRMED.

SCHOONOVER and LEHAN, JJ., Concur.

---

[3] Although we have not discussed it, obviously the fourth amendment is made applicable to the states by operation of the fourteenth amendment.

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA

NOVEMBER 2, 1983

Case No. 82-436

JOE HAYES, APPELLANT,

v.

STATE OF FLORIDA, APPELLEE.

Counsel for appellant having filed a motion for rehearing, rehearing en banc, and/or certification of question in the above-styled case, upon consideration, it is

ORDERED that said motion is hereby denied. It is further

ORDERED that appellee's motion to strike is denied.

A TRUE COPY
TEST:

/s/ William A. Hoddad
WILLIAM A. HADDAD
Clerk District Court of Appeal
Second District

SUPREME COURT OF FLORIDA

THURSDAY, MARCH 22, 1984

Case No. 64,502
District Court of Appeal,
2d District—No. 82-436

JOE HAYES, PETITIONER,

v.

STATE OF FLORIDA, RESPONDENT.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

ALDERMAN, C.J., BOYD, MCDONALD and EHRLICH, JJ., Concur.

ADKINS, OVERTON and SHAW, JJ., Dissent

A True Copy
TEST:

cc: Hon. William A. Haddad, Clerk
Hon. Buddy Clark Alexander, Clerk
Hon. James R. Adams, Judge
Michael E. Raiden, Esquire
William I. Munsey, Jr., Esquire

Sid J. White
Clerk Supreme Court.

By: _____
Deputy Clerk

Supreme Court of the United States

No. 83-6766

JOE HAYES, PETITIONER,

v.

FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO the District Court of Appeal of Florida, Second District.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

OCTOBER 1, 1984

Office - Supreme Court, U.S.
FILED
NOV 8 1984
ALEXANDER L. STEVAS
CLERK

No. 83-6766

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOE HAYES, *Petitioner*,

v.

FLORIDA, *Respondent*.

On Writ Of Certiorari To The District Court Of Appeal Of Florida, Second District

BRIEF FOR PETITIONER

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
MICHAEL E. RAIDEN*
ASSISTANT PUBLIC DEFENDER
Hall of Justice Building
455 North Broadway
Bartow, Florida 33830
(813) 533-1184
*Attorney of Record**

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

34pp

QUESTION PRESENTED

Whether *Davis* v. *Mississippi*, 394 U.S. 721 (1969), prohibits a warrantless, non-consensual detention of a citizen, undertaken without probable cause, for the purpose of obtaining the citizen's fingerprints for comparison with prints found at the scene of a crime, and whether *Terry* v. *Ohio*, 392 U.S. 1 (1968), may be extended to permit such detentions?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
DAVIS v. *MISSISSIPPI*, 394 U.S. 721 (1969), PROHIBITS A WARRANTLESS, NON-CONSENSUAL DETENTION OF A CITIZEN, UNDERTAKEN WITHOUT PROBABLE CAUSE, FOR THE PURPOSE OF OBTAINING THE CITIZEN'S FINGERPRINTS FOR COMPARISON WITH PRINTS FOUND AT THE SCENE OF A CRIME, AND *TERRY* v. *OHIO*, 392 U.S. 1 (1968), CANNOT BE EXTENDED TO PERMIT SUCH DETENTIONS	4
A. The Nature And Scope Of The Protection Afforded By *Davis* v. *Mississippi*	4
B. *Hayes* v. *State: Davis* Excepted, *Terry* Extended	8
C. The Fallacy Of The Florida Court's Expansion Of *Terry* v. *Ohio*	11
D. The Absence of a Constitutionally Acceptable Alternative Justification for the Holding in *Hayes* v. *State*	15
CONCLUSION	25

TABLE OF AUTHORITIES

CASES: Page

Anderson v. *State*, 241 So.2d 390 (Fla. 1970), *vacated on other grounds*, 408 U.S. 938 (1972) 8, 10

Baker v. *State*, 449 N.E.2d 1085 (Ind. 1983) 20

Bradford v. *United States*, 413 F.2d 467 (5th Cir. 1969) 7

Brown v. *Illinois*, 422 U.S. 590 (1975) 23

Bumper v. *North Carolina*, 391 U.S. 543 (1968) 9

Bynum v. *United States*, 262 F.2d 465 (D.C. Cir. 1958) 5, 23

Camara v. *Municipal Court*, 387 U.S. 523 (1967) ... 15 16

Commonwealth v. *Tarver*, 370 Mass. 397, 345 N.E.2d 671 (1975) 14

Commonwealth v. *Youngblood*, 241 Pa.Sup. 72, 359 A.2d 456 (1976) 5-6, 21

Davis v. *Mississippi*, 394 U.S. 721 (1969) ..... *passim*

Davis v. *State*, 240 So.2d 270 (Miss. 1967) ..... i, 4-5, 6

Delaware v. *Prouse*, 440 U.S. 648 (1979) 15

Dunaway v. *New York*, 442 U.S. 200 (1979) .. 4, 11, 20, 21

Florida v. *Royer*, 460 U.S. 491, 75 L.Ed.2d 229, 103 S.Ct. ___ (1983) 4, 20, 21

Gandy v. *State*, 438 So.2d 279 (Miss. 1983) 7

Hayes v. *State*, 439 So.2d 896 (Fla.2d DCA 1983), *rev. den.*, 447 So.2d 886 (Fla.), *cert. granted*, 53 U.S.L.W. 3236 (Oct. 2, 1984) 1, 8-9, 15, 18, 19

In re Armed Robbery, Albertson's, on August 31, 1981, 99 Wash.2d 106, 659 P.2d 1092 (1983) 7

In re Grand Jury Proceedings (Mills), 686 F.2d 135 (3d Cir.), *cert. den. sub nom. Mills* v. *United States*, 459 U.S. 1020 (1982) 17

In re an Investigation into the Death of Abe A., 56 N.Y.2d 288, 452 N.Y.S.2d 6, 437 N.E.2d 265 (1982) 21

Jones v. *Commonwealth*, 556 S.W.2d 918 (Ky. App. 1977) 7

Judd v. *United States*, 190 F.2d 649 (D.C. Cir. 1951) . 9

Kinsler v. *State*, 360 So.2d 24 (Fla.2d DCA 1978) 8, 10

Table of Authorities Continued

	Page
Leigh v. *State*, 587 P.2d 1379 (Okla. Crim. App. 1978)	7
Loomis v. *State*, 261 Ark. 716, 551 S.W.22d 546 (1977)	13
Manor v. *State*, 225 Ga. 538, 170 S.E.2d 290 (1969), *vacated on other grounds*, 408 U.S. 935 (1972)	14
Mapp v. *Ohio*, 367 U.S. 643 (1961)	1
Michigan v. *Summers*, 452 U.S. 692 (1981)	22
Mills v. *State*, 28 Md.App. 300, 345 A.2d 127 (1975), *aff'd* 270 Md. 262, 363 A.2d 491 (1976)	7
Oliver v. *State*, 8 Md.App. 610, 261 A.2d 498 (1970)	13
Orum v. *State*, 46 Ala.App. 543, 245 So.2d 829 (1971)	7
Pardo v. *State*, 429 So.2d 1313 (Fla.5th DCA 1983)	12
Pekar v. *United States*, 315 F.2d 319 (5th Cir. 1963)	9
People v. *Bueno*, 87 Cal.App.3d 163, 151 Cal.Rptr. 55 (App.2d 1979)	23
People v. *Clark*, 30 Cal.App.3d 549, 106 Cal.Rptr. 147 (App.4th), *cert. den.*, 414 U.S. 852 (1973)	23
People v. *Gates*, 24 N.Y.2d 666, 301 N.Y.S.2d 597, 249 N.E.2d 450 (1969)	7
People v. *Gouker*, 628 P.2d 149 (Colo.App. 1981)	7
People v. *Harris*, 43 Cal.App.3d 854, 118 Cal.Rptr. 106 (App.2d 1975)	7
People v. *John B.B.*, 56 N.Y.2d 482, 453 N.Y.S.2d 158, 438 N.E.2d 864 (1982)	16
People v. *Madson*, 638 P.2d 18 (Colo. 1981)	19, 20
People v. *Peoples*, 616 P.2d 131 (Colo. 1980)	14
People v. *Pettis*, 12 Ill.App.3d 123, 298 N.E.2d 372 (App.1st 1973)	7
People v. *Price*, 86 Mich.App. 641, 273 N.W.2d 97 (1978)	7
People v. *Teresinsky*, 30 Cal.3d 822, 180 Cal.Rptr. 617, 640 P.2d 753 (1982)	7
Sibron v. *New York*, 392 U.S. 40 (1968)	11
South Dakota v. *Opperman*, 428 U.S. 364 (1976)	15, 16
State v. *Accor*, 277 N.C. 65, 175 S.E.2d 583 (1970)	7

Table of Authorities Continued

Page

State v. *Anonymous*, 32 Conn.Sup. 306, 353 A.2d 789 (1976) 14

State v. *Barber*, 278 N.C. 268, 179 S.E.2d 404 (1971) . 14

State v. *Brown*, 387 So.2d 567 (La. 1980) 7

State v. *Daniels*, 487 S.W.2d 465 (Mo. 1972) 7

State v. *Downes*, 57 N.C.App. 106, 291 S.E.2d 186 (1982) 15

State v. *Evans*, 215 Neb. 433, 338 N.W.2d 788 (1983) 19, 20, 22

State v. *Grijalva*, 111 Ariz. 476, 533 P.2d 533, *cert. den.*, 423 U.S. 873 (1975) 20

State v. *Hoisington*, 104 Idaho 153, 657 P.2d 17 (1983) 13

State v. *Hunter*, 625 S.W.2d 682 (Mo.App. 1981) 7

State v. *Inman*, 301 A.2d 348 (Maine 1973) 13

State v. *Merklein*, 388 So.2d 218 (Fla.2d DCA 1980) .. 12

State v. *Sharpe*, 284 N.C. 157, 200 S.E.2d 44 (1973) . 14-15

State v. *Walls*, 32 N.C.App. 218, 231 S.E.2d 196 (1977) 7

Talavera v. *State*, 186 So.2d 811 (Fla.2d DCA 1966) .. 9

Terry v. *Ohio*, 392 U.S. 1 (1968) ..... *passim*

United States ex rel. Hollman v. *Rundle*, 329 F.Supp. 1052 (E.D.Pa. 1971), *aff'd* 461 F.2d 758 (3d Cir. 1972) 7

United States v. *Anderson*, 490 F.2d 785 (D.C. Cir. 1974) 14

United States v. *Biswell*, 406 U.S. 311 (1972) 15

United States v. *Brignoni-Ponce*, 422 U.S. 873 (1975) 12, 15

United States v. *Cassell*, 452 F.2d 938 (D.C.Cir.), *cert. den.*, 414 U.S. 880 (1973) 7

United States v. *Dionisio*, 410 U.S. 1 (1973) 3, 16, 17

United States v. *Doe*, 457 F.2d 895 (2d Cir. 1972), *cert. den.*, 410 U.S. 941 (1973) 17

United States v. *Harris*, 453 F.2d 1317 (8th Cir. 1972), *cert.den.*, 412 U.S. 927 (1973) 12

United States v. *Hoopingarner*, 438 F.Supp. 366 (N.D.N.Y. 1977) 17

Table of Authorities Continued

Page

United States v. *Jennings*, 468 F.2d 111 (9th Cir. 1972) 14

United States v. *Kenaan*, 496 F.2d 181 (1st Cir. 1974) 7

United States v. *Long*, 325 F.Supp. 583 (W.D.Mo. 1971), *aff'd* 453 F.2d 1317 (8th Cir. 1972), *cert.den.* 412 U.S. 927 (1973) 7

United States v. *Lyles*, 417 F.2d 1167 (5th Cir. 1973), *cert.den.* 419 U.S. 851 (1974) 7

United States v. *Perez*, 440 F.Supp. 272 (N.D.Ohio 1977), *aff'd* 571 F.2d 584 (6th Cir.), *cert.den.* 435 U.S. 998 (1978) 16

United States v. *Place*, 462 U.S. 696, 77 L.Ed.2d 110, 103 S.Ct. ___ (1983) 22

United States v. *Praigg*, 336 F.Supp. 480 (C.D.Cal. 1972) 12, 16

United States v. *Sanders*, 477 F.2d 112 (5th Cir.), *cert. den.* 414 U.S. 927 (1973) 13

United States v. *Seay*, 432 F.2d 935 (5th Cir. 1970), *cert. den.* 401 U.S. 942 (1971) 7

United States v. *Sechrist*, 640 F.2d 81 (7th Cir. 1981) . 13

United States v. *Whitfield*, 378 F.Supp. 184 (E.D.Pa. 1974), *aff'd* 515 F.2d 506 (3d Cir. 1975) 14

Ybarra v. *Illinois*, 444 U.S. 85 (1979) 11, 12, 15

CONSTITUTIONS, STATUTES, RULES, AND OTHER AUTHORITIES:

United States Constitution, Amendments IV and XIV 1

26 U.S.C. §§ 7602, 7604 17

28 U.S.C. § 1257(3) 1

Ariz. Rev. Stat. Ann. § 13-3905 (1978) 18

Colo. Rev. Stat. Rule 41.1 (1973) 18

Idaho Code § 19-625 18

Iowa Code Ann. §§ 810.2 *et seq.* (West 1979, Supp. 1983) 18

Neb. Rev. Stat. § 29-3303 (1979) 20

Table of Authorities Continued

	Page
N.C. Gen. Stat. §§ 15A-271 *et seq.* (Repl. 1978)	18
Utah Code Ann. § 77-8-1 (Repl. 1982)	18
Sup. Ct. R. 17(1)(c)	1
Model Code of Pre-Arraignment Procedure, app. VIII (1975)	18

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, Second District, affirming Petitioner's convictions of burglary and sexual battery is reported in *Hayes* v. *State*, 439 So.2d 896 (Fla.2d DCA 1983), *rev.den.* 447 So.2d 886 (Fla. 1984)(J.A.32-44).

JURISDICTION

The jurisdiction of this Court is conferred by Title 28 U.S.C. § 1257(3) and Rule 17(1)(c), United States Supreme Court rules, Petitioner having asserted below a deprivation of his rights as guaranteed under Amendments IV and XIV, United States Constitution.

The judgment of the District Court of Appeal of Florida, Second District, was entered September 16, 1983, (J.A.32-44). A timely motion for rehearing was denied by that court November 2, 1983 (J.A.45), and the Florida Supreme Court denied a petition for discretionary review March 22, 1984 (J.A.46). The petition for writ of certiorari was filed May 18, 1984, and granted October 1, 1984. (J.A.47).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV to the Constitution of the United States guarantees the right of citizens to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures. The Fourth Amendment is applicable to the states by virtue of the Fourteenth Amendment. *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

STATEMENT OF THE CASE

Petitioner JOE HAYES was charged by information filed in the Circuit Court, Twentieth Judicial Circuit,

Charlotte County, Florida, with the offenses of burglary and sexual battery (J.A.1-3). After conviction by a jury he was sentenced to 99 years in state prison October 5, 1981, by the Honorable James R. Adams, Circuit Judge (J.A.27-31).

The pertinent facts of the case are as follows: Petitioner was one of several suspects in a series of burglary/rapes occurring in Punta Gorda, Florida, in 1980 (J.A.20,33). Latent fingerprints had been found on the bedroom doorknob of one of the victims, a Mrs. Julienne Hollander (J.A.32). Desirous of obtaining Petitioner's prints for comparison, Detectives Shoup and Gandy of the Punta Gorda Police Department went to Petitioner's home June 23, 1980 (J.A.18,33). Shoup testified he was prepared to arrest Petitioner if he refused to cooperate (J.A.12,33). The police neither sought nor obtained a search warrant, and could give no reason for this omission (J.A.10-11,22-23,33). Petitioner was reluctant to accompany the officers, but did so after they told him they would arrest him (J.A.19-20,33). After Petitioner's prints were found to match those from the Hollander residence, he was arrested and charged with burglary and rape (J.A.11,33).

On September 24, 1980, Petitioner moved to suppress the fingerprint evidence, claiming it had been obtained illegally (J.A.4-7). The motion was heard October 20, 1980, by the Honorable Richard M. Stanley, Circuit Judge (J.A.8-26). The court denied the motion without expressly stating its reasons for doing so (J.A.26). Judge Stanley's ruling provided the principal ground for appeal to the District Court of Appeal of Florida, Second District, as well as the instant proceeding.

The District Court of Appeal of Florida, Second District, affirmed the conviction and sentence September 16, 1983 (J.A.32-44). Specifically, the court agreed with Peti-

tioner that he was detained without probable cause and without his consent (J.A.33-34) but nonetheless justified the seizure of his person as "a logical extension" of *Terry* v. *Ohio*, 392 U.S. 1 (1968)(J.A.43).

SUMMARY OF ARGUMENT

Petitioner was detained by detectives who wished to obtain his fingerprints for comparison with prints found at the scene of a rape. The District Court of Appeal of Florida, Second District, agreed with Petitioner on two points: (1) that there was no probable cause to arrest Petitioner, at least prior to the print comparison; and (2) that Petitioner did not freely and voluntarily submit to the detention. Nevertheless, the court concluded that the situation was distinguishable from that involved in Petitioner's principal authority, *Davis* v. *Mississippi*, 394 U.S. 721 (1969), and held that *Terry* v. *Ohio*, 392 U.S. 1 (1968), and related cases could be extended to permit the seizure of Petitioner's person for fingerprinting.

The conclusion of the Court of Appeal is without foundation. The requirements set forth in *Davis* v. *Mississippi*, that probable cause must exist before police may conduct an "investigatory detention" of a citizen, have never been overruled by this Court, and the case at bar is indistinguishable in principle from *Davis*. Only a few exceptions have been created to the probable cause requirement, involving additional and necessary elements such as emergency, exigency, or prior judicial authorization, not found in the case at bar. *Terry* v. *Ohio* simply does not constitute the investigative tool characterized by the Court of Appeal. While more recent cases, such as *United States* v. *Dionisio*, 410 U.S. 1 (1973), suggest lawful means may exist in theory for accomplishing the goals of the police in the case at bar, no such means

were employed herein, and thus the deterrent function of the exclusionary rule should be invoked. Other cases in the wake of *Davis*, such as *Dunaway* v. *New York*, 442 U.S. 200 (1979), and *Florida* v. *Royer*, 460 U.S. 491, 75 L.Ed.2d 229, 103 S.Ct. ____ (1983), only serve to confirm that the police procedures in the case at bar are offensive to the Fourth Amendment.

ARGUMENT

DAVIS V. MISSISSIPPI, 394 U.S. 721 (1969), PROHIBITS A WARRANTLESS, NONCONSENSUAL DETENTION OF A CITIZEN, UNDERTAKEN WITHOUT PROBABLE CAUSE, FOR THE PURPOSE OF OBTAINING THE CITIZEN'S FINGERPRINTS FOR COMPARISON WITH PRINTS FOUND AT THE SCENE OF A CRIME, AND *TERRY V. OHIO*, 392 U.S. 1 (1968), CANNOT BE EXTENDED TO PERMIT SUCH DETENTIONS.

A. The Nature And Scope Of The Protection Afforded By *Davis v. Mississippi*

On December 2, 1965, an elderly resident of Meridian, Mississippi, was raped in her home by an unidentified black youth. The best evidence available to the investigating officers was a number of finger and palm prints found about a window. During the course of the next few days the police conducted a "dragnet" wherein at least 24 black youths were taken to police headquarters, fingerprinted, and questioned. There was no probable cause to justify any of these detentions, and warrants were neither sought nor obtained beforehand. Among the detainees was one John Davis, aged fourteen. His prints matched those found on the victim's window.

Davis sought without success to have suppressed the fingerprints obtained during this investigatory roundup. Following his conviction for the rape, the Mississippi Supreme Court affirmed. *Davis* v. *State*, 230 So.2d 270

(Miss. 1967). However, their decision was later overturned by this Court in a decision which serves as the point of departure for Petitioner's attack on his own conviction. *Davis* v. *Mississippi*, 394 U.S. 721 (1969).

In *Davis* v. *Mississippi* the Court laid to rest two premises relied upon by the prosecution to support the detentions involved therein. First, citing with approval *Bynum* v. *United States*, 262 F.2d 465 (D.C.Cir. 1958), the Court rejected the argument that fingerprints were not subject to Fourth Amendment protection because of their "inherent trustworthiness."

> True, fingerprints can be distinguished from statements given during detention. They can also be distinguished from articles taken from a prisoner's possession. Both similarities and differences of each type of evidence to and from the others are apparent. But all three have the decisive common characteristic of being something of evidentiary value which the public authorities have caused an arrested person to yield to them during illegal detention. If one such product of illegal detention is proscribed, by the same token all should be proscribed.

Bynum, 262 F.2d at 467, quoted in *Davis* v. *Mississippi*, 394 U.S. at 724.

> Our decisions recognize no exception to the rule that illegally seized evidence is inadmissible at trial, however relevant and trustworthy the seized evidence may be as an item of proof. The exclusionary rule was fashioned as a sanction to redress and deter overreaching governmental conduct prohibited by the Fourth Amendment. To make an exception for illegally seized evidence which is trustworthy would fatally undermine these purposes.

Davis, 394 U.S. at 724. Evidence in such instances is excluded, "not because it is unreliable, but because it is the produce of conduct that is to be deterred." *Common-*

wealth v. *Youngblood*, 241 Pa.Sup. 72, 359 A.2d 456,459 (1976).

Second, the outcome of *Davis* was not affected by the fact the detention occurred during the "investigatory" phase of the case, rather than the "accusatory" stage when attention had focused upon Davis particularly. The Fourth Amendment applies equally. "We made this explicit only last term," said Mr. Justice Brennan, in *Terry* v. *Ohio*, 392 U.S. 1 (1968).

> [T]o argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harrassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed "arrests" or "investigatory detentions."

Davis, 394 U.S. at 726-727.

The Court did suggest that fingerprinting might be permissible, even absent probable cause, under "narrowly circumscribed procedures." As will be seen, this language came back to haunt Petitioner in his initial appeal to the Florida District Court of Appeal. However, the Court in *Davis* continued, "the general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprinting context." *Davis*, 394 U.S. at 728. Since it was not relevant to Davis' case how the police might go about this, the Court declined to speculate and the question remained open.

Numerous courts at both the state and federal levels adopted the general rules set forth in *Davis* and forbade

the use of fingerprints obtained without warrants or probable cause. *See, e.g., United States* v. *Seay*, 432 F.2d 395 (5th Cir. 1970), *cert.den.* 401 U.S. 942 (1971); *United States* v. *Lyles*, 471 F.2d 1167 (5th Cir. 1973), *cert.den.* 419 U.S. 851 (1974); *United States ex rel. Hollman* v. *Rundle*, 329 F.Supp. 1052 (E.D.Pa. 1971), *aff'd.* 461 F.2d 758 (3d Cir. 1972); *Orum* v. *State*, 46 Ala.App. 543, 245 So.2d 829 (1971); *People* v. *Price*, 86 Mich.App. 641, 273 N.W.2d 97 (1978); *Gandy* v. *State*, 438 So.2d 279 (Miss. 1983); *State* v. *Hunter*, 625 S.W.2d 682 (Mo.App. 1981); *People* v. *Gates*, 24 N.Y. 666, 301 N.Y.S.2d 597, 249 N.E.2d 450 (1969); *State* v. *Walls*, 32 N.C.App. 218, 231 S.E.2d 196 (1977). Similarly, analogy has been made to other types of identification evidence such as handwriting exemplars or photographs, where obtained in like manner. *See, e.g., Bradford* v. *United States*, 413 F.2d 467 (5th Cir. 1969); *United States* v. *Cassell*, 452 F.2d 938 (D.C.Cir.), *cert.den.* 414 U.S. 880 (1973); *United States* v. *Kenaan*, 496 F.2d 181 (1st Cir. 1974); *United States* v. *Long*, 325 F.Supp. 583 (W.D.Mo. 1971), *aff'd.* 453 F.2d 1317 (8th Cir. 1972), *cert.den.* 412 U.S. 927 (1973); *People* v. *Teresinsky*, 30 Cal.3d 822, 180 Cal.Rptr. 617, 640 P.2d 753 (1982); *People* v. *Harris*, 43 Cal.App.3d 854, 118 Cal.Rptr. 106 (App.2d 1975); *People* v. *Gouker*, 628 P.2d 149 (Colo.App. 1981); *People* v. *Pettis*, 12 Ill.App.3d 123, 298 N.E.2d 372 (App.1st 1973); *Jones* v. *Commonwealth*, 556 S.W.2d 918 (Ky.App. 1977); *State* v. *Brown*, 387 So.2d 567 (La. 1980); *Mills* v. *State*, 28 Md.App. 300,345 A.2d 127 (1975), *aff'd.* 270 Md.262, 363 A.2d 491 (1976); *State* v. *Daniels*, 487 S.W.2d 465 (Mo. 1972); *State* v. *Accor*, 277 N.C. 65, 175 S.E.2d 583 (1970); *Leigh* v. *State*, 587 P.2d 1379 (Okla.Crim.App. 1978); *In re Armed Robbery, Albertson's, on August 31, 1981*, 99 Wash.2d 106, 659 P.2d 1092 (1983).

The State of Florida first acknowledged the protection afforded by *Davis* v. *Mississippi* in the following dictum from *Anderson* v. *State*, 241 So.2d 390,393 (Fla.1970), *vacated on other grounds*, 408 U.S. 938 (1972):

> Fingerprints taken by the police before a defendant is arrested and without probable cause would violate his Fourth Amendment protection against unreasonable search and seizure. Under these circumstances, the fingerprints have been held inadmissible.

The Second District Court of Appeal, whence comes the case presently at bar, followed suit in *Kinsler* v. *State*, 360 So.2d 24 (Fla.2d DCA 1978), wherein police coerced the defendant to submit a footprint impression for comparison with prints found at the scene of a burglary. This remained the law of Florida until September 16, 1983.

B. *Hayes v. State: Davis* Excepted, *Terry* Extended

On May 13, 1980, a denouement began in Punta Gorda, Florida, remarkably like the situation described in *Davis* v. *Mississippi*. The primary clue available to officers investigating the rape of Mrs. Julienne Hollander was a set of fingerprints found on a bedroom doorknob. Petitioner Joe Hayes was one of a number of suspects developed during the ensuing investigation. Probable cause was lacking to arrest anyone, and no warrants were sought although the police desired to make fingerprint comparisons. Petitioner accompanied Detectives Shoup and Gandy to the police station only as an alternative to formal arrest. He was arrested and charged after his prints were found to match those from Mrs. Hollander's home. Relying heavily on *Davis v. Mississippi* and *Anderson* v. *State*, *supra*, Petitioner moved to suppress the fingerprints. The trial court denied the motion and the Second District Court of Appeal affirmed. *Hayes* v. *State*, 439 So.2d 896 (Fla.2d DCA 1983), *rev. den.* 447

So.2d 886 (Fla.), *cert. granted* 53 U.S.L.W. 3236 (Oct. 2, 1984). In the process they greatly expanded the permissible scope of searches and seizures under Florida law.

At the trial level counsel for the State had argued that probable cause existed for Petitioner's arrest, or in the alternative, that he had freely consented to submit his prints. Both claims were rejected by the Court of Appeal. They held that, in fact, probable cause was lacking and that evidence of consent was "at best, highly questionable." *Hayes*, 439 So.2d at 898. *Cf. Bumper* v. *North Carolina*, 391 U.S. 543 (1968); *Judd* v. *United States*, 190 F.2d 649 (D.C.Cir. 1951); *Pekar* v. *United States*, 315 F. 2d 319 (5th Cir. 1963); *Talavera* v. *State*, 186 So.2d 811 (Fla. 2d DCA 1966).

Despite these seemingly fatal frailties, the court concluded that the seizure of Petitioner's person still was not violative of the Constitution.

> Appellant clearly was seized for purposes of the Fourth Amendment when the officers accosted him on his front porch and asked for his fingerprints. Because this was the sole reason for this intended investigative confrontation and because no interrogation occurred, we conclude that under the narrow circumstances of this case, this was a reasonable seizure or detention of appellant under the Fourth Amendment.

Hayes, 439 So.2d at 899.

The court began its analysis by noting that not all searches and seizures are invalid just because probable cause is lacking, citing principally *Terry* v. *Ohio*, 392 U.S. 1 (1968). They found within *Terry* a "balancing test" between an individual's right of privacy and the right of "[t]he public, and through it the police . . . in effective detection and prevention of crime."

> The focus for the Court in *Terry* and the focus which we follow here is whether the official governmental intrusion was reasonable.

Hayes, 439 So.2d at 899.

From this premise the court went on to make a number of conclusions. First, they held it was "immaterial" whether the prints were made at the police station or on the front porch of Petitioner's home. Next, during "the investigatory stage of the criminal process . . . it does not matter who is moved, the victim or the suspect." Finally, "[w]here there is reasonable suspicion sufficient to justify a stop or detention, it is permissible to stop or detain an individual reasonably long enough to allay or confirm suspicions so as to cause either release or arrest of that individual." Having more or less extricated these conclusions from *Terry* v. *Ohio*, the court ruled Petitioner was "lawfully detained, or seized." *Hayes*, 439 So.2d at 899-900.

Thereupon it was not difficult for the court to find that "[t]he instant case poses the very question left unanswered" by *Davis* v. *Mississippi:* the precise circumstances under which a suspect might be required to submit to fingerprinting despite a lack of probable cause for arrest. *Hayes*, 439 So.2d at 901. The court expressed the opinion that the true meaning of *Davis* had escaped many of the authors relying upon it to exclude fingerprints or similar evidence, including the Florida Supreme Court in *Anderson* v. *State* and its own panel in *Kinsler* v. *State*, *supra*. Not bound by the *Anderson* dicta, the court receded from *Kinsler* to the extent that case would disallow the new holding. The court found Petitioner's fingerprinting was a "minimal intrusion," and that to require judicial intervention before conducting such tests "would unnecessarily hamper efforts both to prevent and to solve

crimes." The procedures followed by the Punta Gorda police constituted only "a logical extension of *Terry;*" to hold otherwise "would render *Terry* a complete nullity." *Hayes*, 439 So.2d at 903.

C. The Fallacy Of The Florida Court's Expansion Of *Terry* v. *Ohio*

The position taken by the Florida District Court of Appeal is wholly invalid. In an effort to demonstrate this invalidity, Petitioner will begin by showing the utter misapplication of *Terry* v. *Ohio*, and then, by reviewing search and seizure law since *Davis* v. *Mississippi*, will argue that no exception has ever been created to the warrant/probable cause requirement, nor should one be created, that is sufficiently extensive to permit the police procedures involved in the case at bar.

Terry v. *Ohio*, 392 U.S. 1 (1968), was a landmark decision permitting limited searches of criminal suspects upon less than probable cause. Specifically, if a police officer believes that the suspect has committed or is about to commit a crime, he may conduct a limited "pat-down" for weapons if he reasonably believes the suspect is armed and dangerous.

Quite obviously, the Second District Court of Appeal believed that *Terry* was intended as a point of departure from the long-established requirement that *evidentiary* searches be based upon probable cause. Nothing could be farther from the truth. As *Terry's* companion case made clear, the *Terry* exception was created for "the protection of the officer by disarming a potentially dangerous man." *Sibron* v. *New York*, 392 U.S. 40,65 (1968). *See also*, *Dunaway* v. *New York*, 442 U.S. 200,210 (1979).

In *Ybarra* v. *Illinois*, 444 U.S. 85 (1979), the State of Illinois attempted to do just what the Florida court did in

the case at bar: apply the *Terry* reasonable belief standard "to aid . . . evidence-gathering." *Ybarra*, 444 U.S. at 94. Instead, the Court flatly refused to transform *Terry* into a general investigative tool:

> Nothing in *Terry* can be understood to allow a generalized "cursory search for weapons" or, indeed, any search whatever for anything but weapons.

Ybarra, 444 U.S. at 93-94.

Above and beyond its heretofore unheard-of expansion of *Terry*, The Second District Court of Appeal found authorization for its holding in a number of other cases that merit discussion, because these cases likewise fail to support the court's reliance upon them. For example, the court analogized Petitioner's seizure to vehicle stops based on a "BOLO" broadcast, and to blood tests performed upon suspected drunk drivers. *State* v. *Merklein*, 388 So.2d 218 (Fla.2d DCA 1980); *Pardo* v. *State*, 429 So.2d 1313 (Fla.5th DCA 1983). In so doing they ignored the element of exigency present in those cases but absent in the case at bar. As recognized in *Davis* v. *Mississippi*, 394 U.S. at 727-728, fingerprints are relatively permanent, need by taken but once, and may be seized at any time including one convenient to the person being printed. The "BOLO" cases are distinguishable because they involve a danger of concealment or destruction of evidence, either through the passage of time or the escape of the fleeing suspect. *Cf. United States* v. *Praigg*, 336 F.Supp. 480, 484 (C.D.Cal. 1972). Such cases embody what this Court elsewhere termed "the absence of practical alternatives" to the brief detentions involved. *United States* v. *Brignoni-Ponce*, 422 U.S. 873,881 (1975).

In *United States* v. *Harris*, 453 F.2d 1317 (5th Cir. 1972), *cert. den.* 412 U.S. 927 (1973), the defendant was

suspected of having stolen a check, and postal inspectors desired to obtain his handwriting sample for comparison. The request was made at Harris' home and he was given an opportunity to consult with his parents. Having done so, he consented to give the sample. Nowhere within that opinion is there the suggestion of coercion, or of the nonconsensual asportation from the home to a police station. Very simply, the protection afforded by *Davis* v. *Mississippi* may be overcome if the defendant freely submits to the fingerprinting or similar identification procedure. *See, e.g., Loomis* v. *State*, 261 Ark. 716, 551 S.W.2d 546 (1977); *State* v. *Hoisington*, 104 Idaho 153, 657 P.2d 17 (1983); *Oliver* v. *State*, 8 Md.App. 610, 261 A.2d 498 (1970).

Equally erroneous is the reliance upon *United States* v. *Sanders*, 477 F.2d 112 (5th Cir.), *cert. den*, 414 U.S. 870 (1973), and *United States* v. *Sechrist*, 640 F.2d 81 (7th Cir. 1981). In both cases the defendants' prints were taken while the defendants otherwise were in lawful custody.

> The gravamen of the unconstitutional conduct of the police in *Davis* was the legally unjustified seizure and detention of Davis' person, there being no warrant issued and no probable cause existing for such seizure. A fingerprint taken under those circumstances automatically became a fruit resulting from the constitutionally proscribed seizure of the person. The conduct prohibited by the Fourth Amendment was *the unreasonable seizure of the person.* . . . Once a person is lawfully in custody, the taking of his fingerprints *after his arrest* is procedure not proscribed by the Fourth Amendment.

State v. *Inman*, 301 A.2d 348, 355 (Maine 1973) (emphasis in the original). In *Sechrist*, 640 F.2d at 85, the Court of

Appeal explained that the defendant had previously been arrested, and was in custody, on other charges:

> When the FBI agent took Sechrist's fingerprints in December 1979, Sechrist was incarcerated in the Shawano County Jail, as he was awaiting trial before the Menominee Tribal Court on an unrelated matter. Because he was in lawful custody at the time, there could be no Fourth Amendment violation with respect to the first level of analysis: the "seizure" of the person.

State v. *Anonymous*, 32 Conn.Sup. 306, 353 A.2d 789,794 (1976), explains why this is so:

> A legal arrest ought to carry with it the right to undertake fingerprinting, handwriting exemplars, and other types of purely physical examinations without having to satisfy Fourth Amendment requirements. There is no question that those procedures done subsequent to a legal arrest at police headquarters or within a reasonable period of time thereafter while the defendant is still detained are proper.

Until now the courts were quick to distinguish the fingerprinting of persons with the diminished privacy interests of prisoners or arrestees from the seizure of citizens from their homes or off the streets, practices which involve the "impos[ition of] burdens substantially like those of arrest" including "transportation to the police station." *United States* v. *Jennings*, 468 F.2d 111, 115 (9th Cir. 1972). *See also United States* v. *Anderson*, 490 F.2d 785 (D.C.Cir. 1974); *United States* v. *Whitfield*, 378 F.Supp. 184, (E.D. Pa. 1974), *aff'd.* 515 F.2d 506 (3d Cir. 1975); *People* v. *Peoples*, 616 P.2d 131 (Colo. 1980); *Manor* v. *State*, 225 Ga. 538, 170 S.E. 290 (1969), *vacated on other grounds*, 408 U.S. 935 (1972); *Commonwealth* v. *Tarver*, 370 Mass. 397, 345 N.E.2d 671 (1975); *State* v. *Barber*, 278 N.C. 268, 179 S.E.2d 404 (1971); *State* v.

Sharpe, 284 N.C. 157, 200 S.E.2d 44 (1973); *State* v. *Downes*, 57 N.C.App. 106, 291 S.E.2d 186 (1982).

D. The Absence Of A Constitutionally Acceptable Alternative Justification For The Holding In *Hayes* v. *State*

In *Ybarra* v. *Illinois*, 444 U.S. at 96 N.10, the Court offered a brief overview of the accepted circumstances wherein searches and seizures may be undertaken despite the absence of probable cause.

If any pattern may be said to emerge from this line of cases, it is *not* that the warrant/probable cause requirement is gradually being relaxed in the direction, and to the extent, endorsed by the Second District Court of Appeal in *Hayes* v. *State*, *supra*. Instead, such searches must constitute something more than just one additional evidence-gathering function. Many of the detentions authorized are relatively trivial or across-the-board stops, often involving vehicles. *See*, *e.g.*, *United States* v. *Brignoni-Ponce*, *supra*; *Delaware* v. *Prouse*, 440 U.S. 648 (1979). Certain search procedures are authorized by administrative or statutory fiat; these are generally routine in nature and involve the implied consent of the detainee. *See*, *e.g.*, *Camara* v. *Municipal Court*, 387 U.S. 523 (1967); *United States* v. *Biswell*, 406 U.S. 311 (1972). Others involve a justification above and beyond the police officer's general incentive to ferret out evidence of crime. *See*, *e.g.*, *Terry* v. *Ohio*, *supra* (self-protection); *United States* v. *Brignoni-Ponce*, *supra* (exigency); *South Dakota* v. *Opperman*, 428 U.S. 364 (1976) (avoidance of civil liability). They are generally more minimal in scope than full-blown searches (*Terry*, pat-down only; *Brignoni-Ponce*, brief auto stop).

Elsewhere, these exceptions to the probable cause requirement have been described as involving "[an]

overweening emergency" or, absent emergency, administratively-devised checkpoint stops where "the decision to 'seize' is [not made] by the officer in the field" and, possibly, a "judicially issued 'area' warrant." *People* v. *John B.B.*, 56 N.Y.2d 482, 453 N.Y.S.2d 158, 438 N.E.2d 864,869 (1982) (Meyer, J. dissenting). In *United States* v. *Perez*, 440 F.Supp. 272, 283 n.31 (N.D.Ohio 1977), *aff'd.* 571 F.2d 584 (6th Cir.), *cert. den.* 435 U.S. 998 (1978), the court noted an additional distinction between *Camara* v. *Municipal Court* and *South Dakota* v. *Opperman*, *supra*, and the remaining cases: these involve searches conducted essentially for "civil purposes and therefore [are] entitled to great leeway under the Fourth Amendment," as opposed to "a search for evidence of a crime" wherein the police are "required to possess probable cause." *Cf. United States* v. *Praigg*, *supra*.

Under none of these prenumbrae would fall the seizure of the Petitioner Joe Hayes.

In recent years a body of case law has emerged approving the taking of fingerprints and other non-testimonial, identification-oriented evidence, even without probable cause. None of these cases remotely approaches the sort of intrusion to which Petitioner was subjected, nor is it conceivable that the various courts authoring those decisions would have reached the same conclusion on Petitioner's facts. An examination of those cases is nevertheless useful because it indicates, first, what this Court meant when in *Davis* v. *Mississippi* it stated that exceptions to the probable cause requirement might exist for fingerprinting, and second, that this Court certainly never intended such a result as was approved by the Florida court in the case at bar.

In *United States* v. *Dionisio*, 410 U.S. 1 (1973), the Court concluded that a grand jury could properly issue

subpoenas to some twenty individuals, in order to obtain voice exemplars for comparison with recorded conversations already in evidence. The Court reaffirmed that

> in *Davis* it was the initial seizure—the lawless dragnet detention—that violated the Fourth and Fourteenth Amendments, not the taking of the fingerprints.

Dionisio, 410 U.S. at 11. The characteristics of the voice, said the Court, are, like handwriting or facial appearance, something "repeatedly produced for others to hear" and "constantly exposed to the public." *Dionisio*, 410 U.S. at 14. The taking of the voice exemplars would involve a procedure less intrusive than a *Terry* frisk.

> Rather, this is like the fingerprinting in *Davis*, where, though the initial dragnet detentions were constitutionally impermissible, we noted that the fingerprinting itself "involves none of the probing into an individual's private life and thoughts that marks an interrogation or search." *Davis* v. *Mississippi*, 394 U.S. at 727.

Dionisio, 410 U.S. at 15.

Crucial to the resolution of *Dionisio* was the majority's conclusion that a grand jury does not operate simply as an arm or tool of the policeman or prosecutor, but as a sort of "protective buffer" between those entities and the accused. *United States* v. *Doe*, 457 F.2d 895, 899 (2d Cir. 1972), *cert.den.* 410 U.S. 941 (1973). *See also In re Grand Jury Proceedings (Mills)*, 686 F.2d 135, 141 (3d Cir.), *cert.den.sub nom. Mills* v. *United States*, 459 U.S. 1020 (1982). In the final analysis, a grand jury is under the control and supervision *of a court*. Similarly, the court in *United States* v. *Hoopingarner*, 438 F.Supp. 366, 367 (N.D.N.Y. 1977), approved Internal Revenue Service summonses pursuant to 26 U.S.C. §§ 7602, 7604, because

of "the interposition of a neutral magistrate between the subject and the investigating agency to prevent abuses."

This hearkens back to that language in *Davis* v. *Mississippi*, 394 U.S. at 728, regarding "narrowly circumscribed procedures" and, particularly, "the authorization of a judicial officer." It will be recalled that the Second District Court of Appeal, in *Hayes* v. *State*, 439 So.2d at 903, dismissed any such judicial authorization as needlessly burdensome. This is perhaps the most flagrant misstatement of the law to be found in the body of that opinion. Prior approval by a magistrate, rather than being needless, is instead crucial and essential, whether in the context of a grand jury investigation or one undertaken by police.

In the wake of *Davis* a number of jurisdictions responded to its dictum by adopting procedures for obtaining fingerprints and like evidence without the necessity of actual arrest.

> Responding to this language, several states adopted statutes allowing judicial officers to issue orders empowering police authorities to seize persons in order to obtain nontestimonial identification evidence. See, Ariz.Rev.Stat.Ann. § 13-3905 (1978); 7B Colo.Rev.Stat. Rule 41.1 (1973); Idaho Code § 19-625 (1979); Iowa Code Ann. §§ 810.2 et seq. (West 1979 & Supp. 1983); N.C. Gen.Stat.§§ 15A-271 et seq. (Repl. 1978); Utah Code Ann. § 77-8-1 (Repl. 1982), See, also, Model Code of Pre-Arraignment Procedure app. VIII at 699 et seq. (1975). In most instances the orders issue upon an affidavit of a police officer showing that there is probable cause to believe that an offense has been committed; that there are reasonable grounds, not amounting to probable cause to arrest, to suspect that the person named or described in the affidavit committed the offense; and that the results of specific nontestimonial identifica-

> tion procedures will be of material aid in determining whether the person named in the affidavit committed the offense. In the only reported case we have found involving a direct constitutional attack on this type of statute, the statue was upheld. *People* v. *Madson*, 638 P.2d 18 (Colo. 1981).

State v. *Evans*, 215 Neb. 433, 338 N.W.2d 788, 792 (1983). Based on a review of recent Supreme Court search and seizure decisions (not unlike that undertaken by the court in *Hayes* v. *State*) the Colorado Supreme Court in *People* v. *Madson*, 638 P.2d at 31-32, concluded:

> [L]imited intrusions into privacy on less than probable cause are reconcilable with the Fourth Amendment guarantees when the following conditions exist. First, there must be an articulable and specific basis in fact for suspecting criminal activity at the outset. Second, the intrusion must be limited in scope, purpose, and duration. Third, the intrusion must be justified by substantial law enforcement interests. Last, there must be an opportunity at some point to subject the intrusion to the neutral and detached scrutiny of a judicial officer before the evidence obtained therefrom may be admitted in a criminal proceeding against the accused.

The requirements of the Colorado law upheld in *Madson* are quite stringent. In addition to the general requirements noted in *State* v. *Evans*, *supra*, the court order must specify the particular type of identification procedure sought to be conducted. Upon completion of that procedure the suspect must be either arrested or set free. No person detained under the rule may be held any longer than is reasonably necessary to conduct the specified test. The order may be executed only within daylight hours, absent a showing the suspect is likely to flee the jurisdiction, and is valid for only ten days after its issuance. No search of the person may be performed absent a separate search warrant. The products of the

testing procedures are subject, upon motion, to destruction if, as a result, probable cause for arrest is still lacking. *People* v. *Madson*, 638 P.2d at 32-33. *Cf. Baker* v. *State*, 449 N.E.2d 1085, 1090 (Ind. 1983).

Interestingly, the Nebraska Supreme Court, in *State* v. *Evans*, 338 N.W.2d at 794, noted that both Colorado and Arizona, the latter in *State* v. *Grijalva*, 111 Ariz. 476, 533 P.2d 533, *cert. den.* 423 U.S. 873 (1975), require only reasonable grounds to connect the detainee with the crime under investigation, not probable cause. Even so, the Nebraska court declined to adopt a similarly relaxed standard, citing *Dunaway* v. *New York*, *supra*, and *Florida* v. *Royer*, 460 U.S. 491, 75 L.Ed.2d 229, 103 S.Ct. ____(1983).

> We find these cases persuasive in reaching the conclusion that the compulsion of a person by police officers to accompany them to a police station or hospital, or wherever, and the forced submission to nontestimonial identification procedures, is a seizure of such magnitude that more than a mere suspicion is required. We read the identifying physical characteristics act to require a showing or probable cause to believe the person to be so seized has engaged in an articulable or criminal offense prior to the judicial officer issuing an order pursuant to [Neb.Rev.Stat. § 29-3303 (Reissue 1979)]. As so interpreted, the act is constitutional. It would be anomalous and indeed bizarre to require such probable cause prior to the seizure of papers, books, and other objects, but not for the seizure of persons.

A year earlier the New York Court of Appeals had reached the same conclusion:

> Further, whatever doubt dicta may have introduced into the subject in *Davis* v. *Mississisippi*. . . has been dispelled by *Dunaway* v. *New York* . . . which squarely held that the seizure of a person can never be undertaken for less than probable cause.

In re an Investigation into the Death of Abe A., 56 N.Y.2d 288, 452 N.Y.S.2d 6, 437 N.E.2d 265, 269 (1982).

The Court in *Dunaway* was only echoing its earlier pronouncement in *Davis* v. *Mississippi* that it is not the evidence itself that is subject to criticism, but the means employed to gain that evidence. *Cf. Commonwealth* v. *Youngblood*, *supra*. Rejecting New York's attempt, basd on *Terry*, *Brignoni-Ponce*, and other such cases, to justify some seizures of the person on a relaxed standard, the Court stated:

> In contrast to the brief and narrowly circumscribed intrusions involved in those cases, the detention of petitioner was in important respects indistinguishable from a traditional arrest.

Dunaway, 442 U.S. at 212.

A bitterly-divided Court in *Florida* v. *Royer*, *supra*, rejected the detention of an airline passenger suspected of drug trafficking. Mr. Justice Rehnquist, dissenting, found no distinction in principle between the brief detention of suspected smugglers, about to board airplanes or exit terminals, and the equally brief detention of vehicles suspected of involvement in transporting illegal aliens, a procedure previously approved by the Court. His emphasis on Royer's "40 foot journey" illustrates a crucial distinction between what the police sought to accomplish in that case and the means employed in the instant case. *Royer*, 75 L.Ed. 2d at 258. Even so, the majority held that even under those much less intrusive circumstances the police may not "seek to verify their suspicions by means that approach the conditions of arrest." *Royer*, 75 L.Ed.2d at 237.

Even more recently, the Court reaffirmed that exceptions to the probable cause requirements are few and

narrow. Citing, *inter alia*, *Michigan* v. *Summers*, 452 U.S. 692 (1981), the Court identified "three law enforcements interest that justif[y] limited detention": preventing flight as a judicially-authorized search is being conducted, minimizing the chance of harm, and the orderly completion of that search. *United States* v. *Place*, 462 U.S. 696, 77 L.Ed.2d 110, 119, 103 S. Ct. ____ (1983).

In light of *Dunaway* and the subsequent authority, it is indeed questionable whether the procedure authorized by Colorado and Arizona passes constitutional muster, as stated by the Nebraska court in *State* v. *Evans*, *supra*. Yet, while a discussion of those procedures is appropriate to illustrate how the Second District Court of Appeal overbroadly depicted the possible fingerprinting exceptions implied by *Davis*, we must not lose sight of the fact that while legal means *might have been* devised and employed to obtain Davis' or Petitioner's prints, *what was actually done* was in violation of the Fourth Amendment and deserving of the invocation of the exclusionary rule.

> Finally, it has been suggested that the controversy about a particular set of fingerprints here is much ado over very little because it would have been simple and proper to have taken appellant's fingerprints in court during trial in order to compare them with the prints said to have been found at the scene of the crime. It is also said that appellant's fingerprints, taken on a proper occasion, were in the possession of the Federal Bureau of Investigation and that these prints could properly have been used in this case. But this argument, like the argument of trustworthiness already discussed, simply does not meet the point. It bears repeating that the matter of primary judicial concern in all cases of this type is the imposition of effective sanctions implementing the Fourth Amendment guarantee against illegal arrest and detention. Neither the fact that the evidence obtained through such detention is itself trustworthy

> or the fact that equivalent evidence can conveniently be obtained in a wholly proper way militates against this overriding consideration. It is entirely irrelevant that it may be relatively easy for the government to prove guilt without using the product of illegal detention. The important thing is that those administering the criminal law understand that they must do it that way.

Bynum v. *United States*, 262 F.2d at 468-469. Remarkably apparent in the instand case is the wanton disregard on the part of Detectives Shoup and Gandy for the prevailing standards of law. The observation of Mr. Justice Blackmun in *Brown* v. *Illinois*, 422 U.S. 590, 605 (1975), is appropriate:

> The illegality here, moreover, had a quality of purposefulness. The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknolwedged that the purpose of their action was "for investigation" or for "questioning" . . . The arrest, both in design and in execution, was investigatory. The detectives embarked upon this expedition in the hope that something might turn up. The manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion.

Or, as noted in *People* v. *Bueno*, 87 Ca.App.3d 163, 151 Cal.Rptr. 55, 58 (App.2d 1979), "the movitation of the officers is a significant factor in determinging whether fingerprint evidence is admissible," citing *People* v. *Clark*, 30 Cal.App.3d 549, 106 Cal.Rptr. 147, 152 (App.4th), *cert. den.* 414 U.S. 852 (1973) (distinguishing arrests "with [a] motive to obtain . . . fingerprints.")

Upon this review of the applicable case law, Petitioner can only conclude as follows:

(1) Fingerprints are not exempt from Fourth Amendment protection simply because of their trustworthiness,

value as an item of proof, or the ease with which they may be obtained. The procedures employed to obtain the prints, including the means of detaining the subject to be printed, must be reasonable and in accordance with constitutional standards.

(2) Investigatory detentions of citizens, particularly those which involve the transportation of the person from one location to another, have always required and continue to require probable cause, at least in the absence of judicial authorization for such detention. The only accepted departures from this traditional standard involve emergency or exigent circumstances not present in the case at bar.

(3) The procedures by certain jurisdictions such as Colorado and Arizona, involving what is essentially a "mini-warrant" or "quasi-warrant," differ from the measures employed against Petitioner in fundamental ways. They require prior judicial authorization. They permit only brief and relatiely convenient detentions. In the wake of *Dunaway* and *Royer*, they may even require probable cause no less than does an actual arrest, notwithstanding the dictum in *Davis* v. *Mississippi* whence they originated.

(4) The Second District Court of Appeal erred in condoning the activities of the police in the instant case, specifically, in rejecting the probable cause requirement and the necessity of prior judicial approval. Their decision is particularly egregious given the flagrant disregard for law displayed by these officers, whose intent from the beginning was to effect an arrest but who were legally unable to do so until *after* obtaining the crucial fingerprint evidence.

CONCLUSION

For the foregoing reasons and authorities, Petitioner respectfully submits that the judgment of the Florida District Court of Appeal, Second District, should be reversed and this case remanded for a new trial.

Respectfully submitted,

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
MICHAEL E. RAIDEN*
ASSISTANT PUBLIC DEFENDER
Hall of Justice Building
455 North Broadway
Bartow, Florida 33830-3798
(813) 533-1184
*Attorney of Record**

Office - Supreme Court, U.S.
FILED
DEC 10 1984
ALEXANDER L. STEVAS,
CLERK

(3)

No. 83-6766

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

JOE HAYES, *Petitioner*,

v.

FLORIDA, *Respondent*.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

BRIEF OF RESPONDENT

JIM SMITH
ATTORNEY GENERAL
STATE OF FLORIDA
WILLIAM I. MUNSEY, JR.*
ASSISTANT ATTORNEY GENERAL
Park Trammell Building
1313 Tampa Street, Suite 804
Tampa, Florida 33602
(813) 272-2670

*Attorney of Record**

73pp

QUESTION PRESENTED

WHETHER DAVIS V. MISSISSIPPI, 394 U.S. 721 (1969), PROHIBITS A WARRANTLESS, NON-CONSENSUAL DETENTION OF A CITIZEN, UNDERTAKEN WITHOUT PROBABLE CAUSE, FOR THE PURPOSE OF OBTAINING THE CITIZEN'S FINGERPRINTS FOR COMPARISON WITH PRINTS FOUND AT THE SCENE OF A CRIME, AND WHETHER TERRY V. OHIO, 392 U.S. 1 (1968), MAY BE EXTENDED TO PERMIT SUCH DETENTIONS.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF CITATIONS	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF THE ARGUMENT	3
A. THE NATURE AND SCOPE OF THE PROTECTION AFFORDED BY DAVIS V. MISSISSIPPI.	7
B. HAYES V. STATE: DAVIS EXCEPTED, TERRY EXTENDED	19
C. THE FALLACY OF THE FLORIDA COURT'S EXPANSION OF TERRY V. OHIO	24
D. THE ABSENCE OF A CONSTITUTIONALLY ACCEPTABLE ALTERNATIVE JUSTIFICATION FOR THE HOLDING IN HAYES V. STATE	38
CONCLUSION	56
CERTIFICATE OF SERVICE	59

TABLE OF CITATIONS

	PAGE
Cases	
Adams v. Williams, 407 U.S. 143 (1972)	44
Aguilar v. Texas, 378 U.S. 108 (1964)	28
Brewer v. Williams, 430 U.S. 387 (1977)	48
Brinegar v. United States, 338 U.S. 160, 175 (1949)	28
Bynum v. United States, 262 F.2d 465 (D.C. Cir. 1958)	9
Camara v. Municipal Court, 387 U.S. 523 (1967)	29
Davis v. Mississippi, 394 U.S. 721 (1969)	Passim
Davis v. State, 255 So.2d 916 (Miss. 1971)	46
Dunaway v. New York, 442 U.S. 200 (1979)	12, 23, 26
Florida v. Rodriguez, __U.S.__, 1984)	43
Florida v. Royer, __U.S.__, 75 L.Ed.2d 229 (1983)	38, 42, 45

Hayes v. State, 439 So.2d 896 (Fla. 2d DCA 1983) review denied 447 So.2d 886 (Fla. 1984) Passim

Henry v. United States, 361 U.S. 98 (1959) 25

Hester v. United States, 265 U.S. 57 (1924) 30

Illinois v. Gates, __U.S.__, 76 L.Ed.2d 527 (1983) 27, 28

Immigration and Naturalization Services v. Delgado, __U.S.__, 80 L.Ed.2d 247 (1984) 41

Katz v. United States, 389 U.S. 347 (1967) 30

Massachusetts v. Upton, __U.S.__, 35 CrL 4044 (1984) 28

Michigan v. Summers, 452 U.S. 692 (1981) 45

Nardone v. United States, 308 U.S. 338, 341 (1939) 54

Nix v. Williams, __U.S.__, 81 L.Ed.2d 377 (1984) 6, 46, 47, 57

Oliver v. United State, __U.S.__ 80 L.Ed.2d 214 (1984) 30

Oregon v. Mathiason, 429 U.S. 492 (1977) 26

Schmerber v. California, 384 U.S. 757 (1966) 14

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 21

Silverthorne Lumber Company v. United States 251 U.S. 385, 392 (1920) 54

South Dakota v. Neville, 459 U.S. 553 (1983) 18

Spinelli v. United States, 393 U.S. 410 (1969) 28

Terry v. Ohio, 392 U.S. 1 (1968) Passim

United States ex rel. Owens v. Twomey, 508 F.2d 858, 865 (7th Cir. 1974) 54

United States v. Beck, 598 F.2d 497, 500-502 (9th Cir. 1979) 26

United States v. Brignoni-Ponce, 422 U.S. 873 (1975) 27, 44

United States v. Crews, 445 U.S. 463, 475-476 (1980) 54

United States v. Dionisio, 410 U.S. 1 (1973) 16, 17

United States v. Euge, 444 U.S. 707 (1980) 15

United States v. Jacobsen, __U.S.__, 80 L.Ed.2d 85 (1984) 30, 32, 34

United States v. Karo, 468 U.S.__, 82 L.Ed.2d 530 (1984) 30, 33

United States v. Mara, 410 U.S. 19 (1973) 17

United States v. Mendenhall, 446 U.S. 544 (1980) 42

United States v. Place, __U.S.__, 77 L.Ed.2d 110 (1983) 40

Wong Sun v. United States, 371 U.S. 471, 486 (1963) 9

Other

28 U.S.C. §1257(3) 1

Rule 17(1)(c), United States Supreme Court Rules 1

§90.404(2)(a), Florida Statutes (1979) 2

Amendment IV and XIV, U.S. Const. 1

§7602 of the Internal Revenue Code 15

OPINIONS BELOW

The opinion of the district court of appeal of Florida, second district, affirming Petitioner's convictions of burglary and sexual battery is reported as Hayes v. State, 439 So.2d 896 (Fla. 2d DCA 1983) review denied 447 So.2d 886 (Fla. 1984)(J.A. 32-44).

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. §1257(3) and Rule 17(1)(c), United States Supreme Court Rules. Throughout this litigation, Joe Hayes has asserted a deprivation of his rights as guaranteed by Amendments IV and XIV, United States Constitution.

On September 16, 1983, the judgment of the district court of appeal of Florida, second district was entered. Rehearing was denied on November 2, 1983. On March 22, 1984, the Florida Supreme Court

denied a petition for discretionary review. This Court granted Joe Hayes' petition for writ of certiorari on Monday, October 1, 1984. __U.S.__, 83 L.Ed.2d 30.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States which provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law....

This case more specifically involves the Fourth Amendment to the Constitution of the United States which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Respondent accepts Petitioner's statement of the case and history of the case as there is no disagreement as to the factual representations.

SUMMARY OF THE ARGUMENT

The Florida circuit court denied Joe Hayes' motion to suppress without making specific findings as to probable cause or voluntariness. J.A. 26. The Florida court of appeals concluded police did not have probable cause to arrest Joe Hayes prior to taking his fingerprints. J.A. 34. The Florida appellate court did not hold that Joe Hayes freely and voluntarily submitted to detention; rather, the court stated that it was highly questionable that Joe Hayes accompanying the officers to the police station could be considered voluntary. J.A. 33. The opinion of the Florida court of appeals

addresses the question this Court left open in Davis v. Mississippi, 394 U.S. 721 (1969).

Joe Hayes was detained solely for the purpose of securing fingerprints. He was not interrogated; and, he was detained no longer than reasonably necessary to secure the fingerprint impressions for comparison purposes. Florida argues that such a minimal intrusion upon Joe Hayes under these narrow facts and circumstances did not infringe any of his Fourth Amendment rights. Concededly, there was an investigative confrontation when Joe Hayes opened his door to police and ultimately accompanied them for the exclusive purpose of securing fingerprints. This detention and/or seizure is reasonable under the Fourth Amendment. Florida's legitimate interest in solving a violent crime outweighed Joe Hayes' interest in privacy as defined by

the Fourth Amendment. Under these narrow facts and circumstances, this position is not an illogical extension of Terry v. Ohio, 392 U.S. 1 (1968).

On alternate constitutional grounds, Justice Stewart's dissent in Davis v. Mississippi, 394 U.S. 721 (1969) has gained contemporary constitutional recognition. There is probable cause now to arrest Joe Hayes for the rape of Julianne Hollander. The victim gave positive in-court identification of petitioner. Joe Hayes is subject to being re-arrested; booked; and, fingerprinted. These fingerprints would be admissible in evidence. Additionally, once police had compared the herringbone pattern tennis shoes with the shoe prints left at the rape scenes, probable cause would have existed to arrest Joe Hayes and, as a concomitant, his fingerprints would have been secured. In

Nix v. Williams, __U.S.__, 81 L.Ed.2d 377 (1984), this Court recognized an "inevitable discovery" exception to the exclusionary rule. On this record, Florida has demonstrated that Joe Hayes' fingerprints would have been obtained inevitably. Assuming police misconduct, and none is present, there is no basis to have kept the fingerprint evidence from the jury. Under this independent line of investigation, Florida and Joe Hayes are placed in the same position had there been no police misconduct. The prosecution has no advantage from a purported Fourth Amendment deprivation; and, Joe Hayes has suffered no prejudice. Both Florida and Joe Hayes are placed in the same positions they would have occupied but for the purported impermissible police conduct. The inevitable discovery rule bars setting aside convictions that would have been obtained

without police misconduct.

A. THE NATURE AND SCOPE OF THE PROTECTION AFFORDED BY DAVIS V. MISSISSIPPI.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

(1791)

The Fourth Amendment protects people, not places. This protection is recognized in Davis v. Mississippi, 394 U.S. 721 (1969). John Davis was convicted and sentenced in the Mississippi state court for the rape of an 86 year old woman. John Davis was a black youth and his victim a white geriatric. The crime was committed on December 2, 1965, and John Davis was indicted in May of 1966. When police investigated the

crime scene, they were able to life a palm print and fingerprints from the victim's window and window sill. The hospitalized victim informed police that the rapist was a Negro youth. At that time, the victim did not make a positive identification of John Davis. On the day following the rape and until the day John Davis was indicted, the Meridian, Mississippi police interrogated between 65 to 70 Negro youths, including John Davis. John Davis was taken to the local police station for interrogation and fingerprinting on December 3rd (the day following the crime). John Davis was questioned by police numerous times at his home, in a car, and at city hall. Additionally, 23 other Negro youths were detained for questioning and fingerprinting in connection with the rape. The fingerprints of John Davis and the other 23 suspects were forwarded to the Washington,

D.C. headquarters of the Federal Bureau of Investigation for study and comparison. John Davis' fingerprints were positively identified.

Both in the Mississippi appellate court and in this Court, John Davis argued his fingerprints were taken while he was illegally under arrest and without benefit of counsel. This Court, per Justice Brennan, held that the prints should have been excluded as the fruits of a seizure of John Davis in violation of the Fourth Amendment. The 6-2 majority of the Court, through Justice Brennan, excluded the fingerprints as the product of an unlawful detention. Davis v. Mississippi, supra at 728. See, Wong Sun v. United States, 371 U.S. 471, 486 fn 12 citing Bynum v. United States, 262 F.2d 465 (D.C. Cir. 1958). However, Justice Brennan intimated that a detention for such purpose might be per-

missible on evidence insufficient for arrest. The question continues to remain open and was then not reached in Davis on this basis:

> We have no occasion in this case, however, to determine whether the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest. For it is clear that no attempt was made here to employ procedures which might comply with the requirement of the Fourth Amendment: the detention at police headquarters of petitioner and the other young Negroes was not authorized by a judicial officer; petitioner was unnecessarily required to undergo two fingerprinting sessions; and petitioner was not merely fingerprinted during the December 3rd detention but also subjected to interrogation.
>
> (text of 394 US at 728)

In the concurrence of Justice Harlan, he noted: "There may be circumstances, falling short of the 'dragnet' procedures employed in this case, where compelled sub-

mission to fingerprinting would not amount to a violation of the Fourth Amendment even in the absence of a warrant, and I would leave that question open." Davis v. Mississippi, supra at 728.

Justices Black and Stewart dissented. Although Justice Stewart agreed that John Davis was arrested and detained without probable cause, he dissented in Davis on the ground that "Fingerprints are not 'evidence' in the conventional sense that weapons or stolen goods might be. Like the color of a man's eyes, his height, or his very physiognomy, the tips of his fingers are an inherent and unchanging characteristic of the man." Id. at 730.

The range of operation of Davis does not encompass the question of detention solely for the purpose of obtaining fingerprints. This Court did not need to decide that question because, under the

facts of that case, it was unnecessary to do so. The questioning of Joe Hayes and the taking of his fingerprints were not part of a "dragnet" operation of the type conducted in Davis. In Davis, this Court held that fingerprints evidence was inadmissible as the Mississippi police has interrogated John Davis in addition to merely taking his fingerprints. This Court invited resolution of the question in Dunaway v. New York, 422 U.S. 200 (1979). Justice Brennan in an analysis of Davis v. Mississippi again confirmed that detention for purposes of the Fourth Amendment continues to require probable cause regardless as to whether the detention occurred during the investigatory rather than the accusatory stage of the investigation. However, Dunaway recognized the unanswered question as to whether police may detain on less than

probable cause when the sole purpose of the detention is to take fingerprints. Justice Brennan points out in the Dunaway majority opinion:

> In Davis, however, the Court found it unnecessary to decide the validity of a "narrowly circumscribed procedure for obtaining" the fingerprints of suspects without probable cause--in part because, as the Court emphasized, "petitioner was not merely fingerprinted during the... detention but also subjected to interrogation.
>
> (text of 442 U.S. at 215)

Florida argues the nature and scope of the protection afforded by Davis v. Mississippi is limited to those Fourth Amendment encounters where an individual is seized and interrogated. There fingerprinting is a concomitant to the police interrogation and results in a constitutional deprivation. The intent and purpose of Davis v. Mississippi hits its mark; however, the target of a detention to take fingerprints (without interrogation) is not

within the orbit of the Davis v. Mississippi holding.

Fingerprints do fall into an entirely different category from testimonial communications obtained under interrogation. The privilege against self-incrimination under the Fifth and Fourteenth Amendment does not operate to proscribe what was done here. In Schmerber v. California, 384 U.S. 757 (1966), the defendant was convicted of driving an automobile while intoxicated. While receiving treatment at the local hospital for injuries sustained, defendant was arrested and hospital personnel were directed by the police to draw blood. Armando Schmerber objected urging the attendant circumstances gave rise to a due process violation. The blood sample (evidencing intoxication) was admitted into evidence and affirmed in state court on appeal. This Court

affirmed the California appellate court as the taking of the blood sample and the introduction into evidence of the chemical analysis did not violate defendant's Fourth, Fifth, or Fourteenth Amendment rights.

More recently, this Court reviewed a matter where a taxpayer was summoned by the Internal Revenue Service to appear and produce a handwriting exemplar. The district court held the summons should be enforced; but, on appeal, the eight circuit denied enforcement. This Court reversed. United States v. Euge, 444 U.S. 707 (1980). Although Section 7602 of the Internal Revenue Code which authorizes the IRS to summon individuals to "appear" and "to produce such books, papers, records, or other data, and to give testimony" as might be relevant to a tax investigation inherently including the authority to com-

pel handwriting exemplars. This Court pointed out the policy reasons for enforcement absent express statutory prohibition or countervailing congressional policy. Specifically, this Court observed that handwriting exemplars are neither a search or seizure under the Fourth Amendment or Fifth Amendment. Id., at 718. In dissent, Justice Brennan (with whom Justice Marshall and Justice Stevens joined) points out in a separate opinion in footnote 2:

> The Court's use of the label "nontestimonial" is meaningful, for "[t]estimony properly means only such evidence as is delivered by a witness..., either orally or in the form of affidavits or depositions." Black's Law Dictionary 1324 (5th ed 1979). Testimony is a statement of knowledge or belief by a witness as opposed to the mere display of a physical characteristic.
>
> (text of 444 U.S. at 720)

Authority for this holding is found in United States v. Dionisio, 410 U.S. 1

(1973) and United States v. Mara, 410 U.S. 19 (1973). In the former, this Court held that a grand jury witness's Fourth Amendment rights were not violated when he was compelled to furnish a voice exemplar. Thus, a preliminary showing of "reasonableness" was not required. There Justice Stewart reflecting on Davis v. Mississippi noted: "Rather, this [voice exemplars] is like the fingerprinting in Davis, where, though the initial dragnet detentions were constitutionally impermissible, we noted that the fingerprinting itself 'involves none of the probing into an individual's private life and thoughts that marks an interrogation or search.'" United States v. Dionisio, 410 U.S. 1, 15 (1973). In the latter, United States v. Mara, 410 U.S. 19, 20 (1973), this Court reasoned that "[h]andwriting, like speech, is repeatedly shown to the public, and there

is no more expectation of privacy in the physical characteristics of a person's script than there is in the tone of his voice." Every individual (when touching an object) leaves smudges and smears displaying fingerprint impressions which are continually exhibited to the public.

Most recently, in South Dakota v. Neville, 459 U.S. 553 (1983), Justice O'Connor in writing for the majority held a drunk driver's refusal to take a blood alcohol test may be used against him at trial without violating his Fifth Amendment rights. The driver's refusal involved no impermissible coercion on the part of law enforcement; and, thus, there was no constitutional deprivation.

Here, Joe Hayes was transported to the police station for the limited purpose of taking fingerprints. He was detained no longer than it took to take the finger-

print impressions and conclude a match. An expert was waiting, on stand by, to compare the fingerprints. At that point, Joe Hayes was arrested. (State Court record 513).

In no way does the holding in Hayes v. State, 439 So.2d 896 (Fla. 2d DCA 1983) travel outside the scope of Davis v. Mississippi. The taking of fingerprints is neither testimonial nor, as discussed infra, is there a reasonable expectation of privacy on the part of Joe Hayes in his fingerprints.

B. HAYES V. STATE: DAVIS EXCEPTED, TERRY EXTENDED

Terry v. Ohio, 392 U.S. 1 (1968) recognized for the first time that Fourth Amendment seizures of persons must be based on probable cause. This Court declined to stretch the concept of "arrest" --and the general rule requiring probable cause to make arrests "reasonable" under

the Fourth Amendment to stop-and-frisk intrusions as they are the rule of police conduct. Id., at 20. Under the Fourth Amendment, the Terry Court balanced the limited violation of individual privacy involved against the opposing interests in crime prevention and detection and in the police officer's safety. Id., at 22-27. "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons." Id., at 1. Concededly, this case contains an expressed intention of the police to arrest Joe Hayes if he did not accompany them to police headquarters. J.A. 20; 439 So.2d 896, 898. Significantly, the state appellate opinion states: "It is ...highly questionable that appellant's accompanying the officers to the station could be considered voluntary." 439 So.2d at 898. The state trial court denied the

motion to suppress without making specific findings as to voluntariness. J.A. 26. Whether consent to search is voluntary is a matter to be determined from a totality of the circumstances; and, an individual need not be informed of his right to decline consent. See, Schneckloth v. Bustamonte, 412 U.S. 218 (1973). That an individual is given options does not negate the volitional nature of consent. Florida does not abandon its argument that Joe Hayes voluntarily accompanied police for fingerprinting. But, this case is free of a show of physical authority. Initially, the officer asked Joe Hayes if he would accompany the police to headquarters for questioning, and petitioner responded he would. J.A. 19; State court trial record 483-484. Joe Hayes then vacillated. J.A. 19. Joe Hayes was not told that he was under arrest or in custody; and, he was

not warned not to resist or flee. No weapons were displayed and Joe Hayes was not handcuffed. There is no testimony nor suggestion that Joe Hayes was touched or held during the trip to police headquarters. The Florida appellate court suggested Hayes to be seized because of the statement by the investigating officer to Hayes mentioning arrest as a possibility. J.A. 12; 439 So.2d 896, 898. Although not clear within the motion to suppress transcript (J.A. 8-26), the state court trial record indicates that police had interviewed two other rape victims. From these interviews, Joe Hayes became the target. This testimony was excluded at trial as a prophylactic measure so that there would be no violation of §90.404(2)(a), Florida Statutes (1979). (State Court Trial Record 486-487).

In Dunaway v. New York, 442 U.S. 200, 224 (1979) Justice Rehnquist (with whom The Chief Justice joins) points out in footnote 1:

> Neither Davis v. Mississippi, 394 U.S. 721...(1969), nor Brown v. Illinois, 422 U.S. 590 (1975), which the Court treats as departure for today's opinion, support the Court's conclusion that petitioner was "seized" within the meaning of the Fourth Amendment. In Davis, the State made no claim that Davis had voluntarily accompanied the police officers to headquarters. 394 U.S., at 726... Similarly, in Brown there would be no reasonable disagreement that the defendant had been "seized" for Fourth Amendment purposes.

On this sub-point, Joe Hayes ignores the plain, restrictive language of the state court opinion:

> However, this decision should not in any way be construed as giving law enforcement officers carte blanche to fingerprint every person suspected of committing a crime currently under investigation. We hold only that under the narrow facts of this case, the government's legitimate interest in law enforcement, specifically,

> solving of a violent crime, outweighed appellant's interest in privacy as defined by the fourth amendment.[3/] The initial seizure of appellant was reasonable as was the seizure of his fingerprints. As we have earlier stated, the seizure of the tennis shoes presents no fourth amendment problems.
>
> [3/] Although we have not discussed it, obviously the fourth amendment is made applicable to the states by operation of the fourteenth amendment.

See, J.A. 44; 439 So.2d 896, 903-904. The restrictive language of the opinion makes it applicable to only a narrow class of cases. From a doctrinal position, there has been no extension of Terry in the Florida court.

C. THE FALLACY OF THE FLORIDA COURT'S EXPANSION OF TERRY V. OHIO

There is no federal constitutional deception or error in the Florida appellate opinion.

In Terry v. Ohio, 392 U.S. 1 (1968), this Court held that law enforcement term "stop and frisk" is within the orbit of the Fourth Amendment. The person who is approached and spoken to by a policeman and is denied the right to walk away, is a seized person. Earlier, this Court taught in Henry v. United States, 361 U.S. 98 (1959) that once a suspect is taken into custody or otherwise deprived of his freedom of action in any significant way, he is "under arrest." In Henry, after twice observing cartons being loaded into a car, FBI agents who were investigating thefts of interstate liquor shipments stopped the car in which two individuals were riding. A resultant search of the car revealed stolen radios. The individuals were then placed under formal arrest. This Court held that the arrest occurred when the agents stopped the car, pointing out "the

officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete" and finding an absence of probable cause, the search was held illegal. See, Dunaway v. New York, 442 U.S. 200 (1979). Whether there is an arrest depends on an evaluation of all the circumstances. United States v. Beck, 598 F.2d 497, 500-502 (9th Cir. 1979). Cooperation with police to allay, quiet, calm, or diminish suspicions does not constitute an arrest. Oregon v. Mathiason, 429 U.S. 492 (1977).

The Florida appellate court observed the police were prepared to arrest Joe Hayes if he declined to cooperate. J.A. 33; 439 So.2d 896, 898. Joe Hayes informed police that he would rather go to the police station than be arrested. Id. The testimony elicited at the hearing on the motion to suppress indicates that Joe

Hayes was informed he would be arrested if he did not accompany police for fingerprinting. J.A. 12; 19; 20.

When the probable cause requirement of the Fourth Amendment is not reflected in the facts of a case, the court then examines all the attendant facts and circumstances involved to determine whether police intrusion was reasonable for Fourth Amendment purposes. United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

In Illinois v. Gates, __U.S.__, 76 L.Ed.2d 527 (1983) this Court adopted a practical, common-sense approach to probable cause applications for search warrants: "...probable cause is a fluid concept--turning on the assessment of probabilities in particular factual contexts--not readily, or even usefully, reduced to a neat set of legal rules." 76 L.Ed.2d at 544. Justice Rehnquist in writing for the

majority relied on Brinegar v. United States, 338 U.S. 160, 175 (1949): "In dealing with probable cause, ...as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." So that there was no misunderstanding as to the impact of Illinois v. Gates, __U.S.__, 76 L.Ed.2d 527 (1983) this Court summarily reversed the Massachusetts Supreme Judicial Court in Massachusetts v. Upton, __U.S.__, 35 CrL 4044 (1984) holding that Gates rejected Aguilar v. Texas, 378 U.S. 108 (1969) and Spinelli v. United States, 393 U.S. 410 (1969) as being hypertechnical.

Although Gates is directed to Fourth Amendment treatment of applications for search warrants, its language sets the

definitional bounds for probable cause. Probable cause requirements are fluid. Petitioner's attack continues to ignore that in undertaking an examination as to whether police intrusion is reasonable for Fourth Amendment purposes, the state court must compare and balance the competing interests involved. See, Camara v. Municipal Court, 387 U.S. 523 (1967). In this case, that balance was struck in favor of Florida in solving a violent crime. As no interrogation ensued, the seizure or detention of Joe Hayes was reasonable under the Fourth Amendment. J.A. 12-13; 439 So.2d at 899. The state appellate court opinion satisfies the underpinnings of Terry v. Ohio. There is no fallacy in the Florida appellate opinion. It is constitutionally sound.

This past term, the Court has rendered three (3) doctrinal expectation of privacy

decisions which have a bearing on the case at hand. United States v. Jacobsen, __U.S.__, 80 L.Ed.2d 85 (1984); Oliver v. United States, __U.S.__, 80 L.Ed.2d 214 (1984); and, United States v. Karo, 468 U.S.__, 82 L.Ed.2d 530 (1984). In Oliver, police entered private property passing a locked gate and a no trespassing sign and found a crop of growing marijuana. Justice Powell relying on Justice Holmes' statement in Hester v. United States, 265 U.S. 57 (1924) reiterated that the Fourth Amendment's protection accorded to "persons, houses, paper, and effects" does not extend to open fields. Internal reliance was placed on the principles regarding privacy rights expressed in Katz v. United States, 389 U.S. 347 (1967). Not all an individual's subjective expectations of privacy are protected. Rather, only "those expectations that society is

prepared to recognize as 'reasonable.'" A broad definition was applied to "open fields." Joe Hayes had no expectation of privacy in his tennis shoes left in plain and open view on his porch; and, as argued, there is no reasonable expectation of privacy in fingerprints. As in open fields, there is no expectation of privacy as to what is left to plain and open view on the porch of a house.

Prior to Oliver, this Court in Jacobsen held constitutional the warrantless "chemical field test" of suspected narcotics. The contraband had been discovered by employees of Federal Express when examining a damaged package for insurance purposes. Justice Stevens explained that the Fourth Amendment is implicated in such a situation when the governmental intrusion exceeds the scope of the antecedent private search. Justice

Stevens also defined expectations involving both a "search" and "seizure": "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interest in that property." United States v. Jacobsen, 80 L.Ed.2d at 94. Justice Stevens addressed the fact that the field test required the destruction of a trace amount of the lawfully-detained powder did not render this "seizure" unreasonable as it "could, at most, have only a de minimis impact on any protected property interest." Here, the police did not destroy the epidermal ridge patterns comprised of the arches, loops, and whorls found on Joe Hayes' fingerprints.

In United States v. Karo, 468 U.S.__, 82 L.Ed.2d 530 (1984), this Court held that the warrantless monitoring of a "beeper" in a container of chemicals after it had been inadvertently taken into a residence constituted a Fourth Amendment deprivation. From a doctrinal stance, the Karo decision stresses this Court's continuing view that society has a reasonable expectation of privacy in residences. Here, Joe Hayes' home was never entered.

Against this authority, the question left open in Davis v. Mississippi closes against Joe Hayes causing no discord within the Fourth Amendment's sense of propriety, order, and fair play. Several questions must be posed. Did the seizure of Joe Hayes for the limited purpose of taking his fingerprints result in a meaningful interference with his possessory interests in his property--here finger-

prints. Significantly, in United States v. Jacobsen, __U.S.__, 80 L.Ed.2d 85, 102 (1984), Justice Stevens pointed out that a field test which required destruction of a trace amount of contraband did not render the seizure unreasonable as it "could, at most, have only a de minimis impact on any protected property interest." As recognized in Davis v. Mississippi, fingerprints have unique characteristics. They do not change because they are "lifted" or "impressed".[1/] The taking of a fingerprint

1/ After the fourth month of the development of the fetus, there appears to be no change in ridge patterns during the life of the individual, although environmental factors such as scars, which are easily recognized, may appear to affect the pattern. See, Fingerprint Identification by Manuel E. Nestle, 36 POF 2d p. 294.

impression does not destroy the epidermal fingerprint ridge patterns; nor, does Joe Hayes claim such destruction. Thus, has there been a meaningful interference with the ridge patterns of Joe Hayes' fingerprints? Common-sense answers the question —no.

Specifically, what are an individual's expectation to privacy rights in fingerprints? When born, a hospital does not secure parental consent to fingerprint the infant. Has the Fourth Amendment been violated? Between birth and death, an individual leaves fingerprint and palmprint impressions as smears and smudges on every item touched during the course of a day's activities. Recognizing this fact, the state of Florida uses its police power to require fingerprinting for varying pro-

fessions and occupations.[2] See, Validity of statutes, ordinance, or regulation requiring fingerprints of those engaging in specified occupations. 41 ALR 3d 732.

---

[2] License applicants for alcoholic beverages (§561.17, Fla. Stat.)
Bar applicants for attorney-at-law (§545.026, Fla. Stat.)
Bail bondsmen and runners (§648.34, Fla. Stat.)
Cigarette wholesale dealers & exporters (§210.15, Fla. Stat.)
Correctional officers (§§943.13, 943.14, Fla. Stat.)
Criminal Defendants (§§921.241, 30.31., 943.051, 39.031, 812.014, 921.242, Fla. Stat.)
Permit applicants for explosives (§552.092, Fla. Stat.)
Farm Labor contractors (§450.33, Fla. Stat.)
Registration requirement for felons (§775.13, Fla. Stat.)
Firefighters (§633.34, Fla. Stat.)
Horse show promoters (§535.21, Fla. Stat.)
License applicants for investigative & patrol services (§493.309, Fla. Stat.)
Law enforcement officers (§§943.13, 943.14, Fla. Stat.)
Mortgage brokers & solicitors (§494.04, Fla. Stat.)
Seller's thumbprint for precious metal sales (§538.011, Fla. Stat.)

It cannot be argued, nor does Joe Hayes urge, that the taking of a fingerprint impression reaches a level of privacy expectation as reflected in the removal of blood samples; removal of hair samples; removal of urine samples; swabbing or scraping tissue; use of stomach pump, emetic and/or laxative; rectal cavity search; vaginal cavity search; and, artificial limb search. See, Propriety of search involving removal of natural substance or foreign object from body by actual or threatened force. 66 ALR Fed 119-

3 cont./
Racing permit holders (§550.181, Fla. Stat.)
Real estate brokers & salesmen (§475.175, Fla. Stat.)
Real estate school instructors (§475.451, Fla. Stat.)
Securities dealers (§517.12, Fla. Stat.)
Sensitive & special trust positions for state employees (§110.1127, Fla. Stat.)
Subdivided land sales registrants (§498.031, Fla. Stat.)

164. It is in these matters, more critical Fourth Amendment questions are posed.

D. THE ABSENCE OF A CONSTITUTIONALLY ACCEPTABLE ALTERNATIVE JUSTIFICATION FOR THE HOLDING IN HAYES V. STATE

Joe Hayes ignores an acceptable constitutional alternative which justifies the Florida court of appeals opinion. As predicate to the "alternative", if there is neither a reasonable expectation of privacy in fingerprints nor a meaningful intrusion into Joe Hayes' possessory interests in his fingerprints, the detention must be addressed.

This Court decided Florida v. Royer, __U.S.__, 75 L.Ed.2d 229 (1983) on March 23, 1983. The Joe Hayes case was argued before the Florida appellate court on March 28, 1983; and, the opinion was rendered on September 16, 1983. The Royer opinion was never submitted to that court. In Royer, speaking for a four-Justice

plurality, Justice White found a suspect's consent to search luggage at a Miami airport tainted by an illegal detention. Royer's actions matched security's drug courier profile. Airport security was justified in temporarily detaining Mark Royer and his luggage while attempting to dispel their suspections under Terry v. Ohio, 392 U.S. 1 (1968). However, airport security retained Royer's airline ticket and driver's license; Mark Royer was requested to accompany airport security (along with his luggage) to a private office without being informed he was free to leave. At this juncture, the plurality held that airport security had exceeded any right they had to detain Mark Royer under Terry. Justice White also explained that the airport security agents' conduct "was more intrusive than necessary to effectuate an investigative detention"

under Terry. Although airport security was justified in detaining Mark Royer, the plurality (through Justice White) concluded airport security was more interested in Mark Royer's luggage than in conversation with Mark Royer. Justice Rehnquist in dissent (joined by The Chief Justice and Justice O'Connor) concurred in the plurality conclusion that airport security had grounds for a temporary detention; however, the dissent urged airport security's subsequent actions in terms of "reasonableness" fell within constitutional bounds. Later, in United States v. Place, __U.S.__, 77 L.Ed.2d 110 (1983), on similar facts (where the suspect was not detained; but, his luggage was), it did not violate the Fourth Amendment for a trained dog to verify narcotics contained in a passenger's luggage. However, detaining the luggage for 90-minutes was held unrea-

sonable. The emerging question, for Fourth Amendment purposes, continues to be whether under Terry the seizure be reasonable. Here, a fingerprint expert was on "stand by" to compare the fingerprints. J.A. 19. Joe Hayes' detention was to last long enough to compare the fingerprints; and, if they did not match, Joe Hayes was to be taken home. J.A. 13. Joe Hayes was detained no longer than necessary to obtain his fingerprints and compare them with the ones found at the rape scene.

Building on these decisions, Justice Rehnquist (writing for the majority) in Immigration and Naturalization Service v. Delgado, __U.S.__, 80 L.Ed.2d 247 (1984), held "factory surveys" where illegal aliens sometimes comprise a work force pass Fourth Amendment standards. The same question continues to emerge. When does an "encounter" with law enforcement become

a detention and/or seizure? Here, this Court found that in Delgado the INS conducted their survey with employer's consent. Agents were stationed at the building's exits while the interrogating, armed agents walked throughout the factory displaying their badges. They inquired about citizenship and requested production of immigration papers. There existed discord between United States v. Mendenhall, 446 U.S. 544 (1980) and Florida v. Royer, __U.S.__, 75 L.Ed.2d 229 (1983). In the former, Justice Stewart (in a plurality opinion joined by Justice Rehnquist and joined in part [all but Part II-A] by The Chief Justice, Justice Blackmun, and Justice Powell) voiced:

> "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a

> seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."
>
> (text of 446 U.S. at 554)

The focus in Delgado was shifted from Mendenhall to Royer. In the latter case, police questioning by itself is unlikely to result in a Fourth Amendment violation. If a citizen declines to answer (and additional steps are taken by police to secure answers) the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure. See, Florida v. Rodriguez, __U.S.__, 36 CrL 4086 (U.S. Nov. 13, 1984) describing consensual encounters and articulable basis for detention. Here, Joe Hayes initially consented to accompany police. Police inquired if arrest was necessary

and Joe Hayes then stated he would go voluntarily. No threats or coercion were used. That Joe Hayes was given a choice, under these circumstances, does not render his consent involuntary. The Florida trial court made no specific findings as to voluntariness of consent. J.A. 26. The Florida appellate court found the voluntariness of the consent highly questionable. J.A. 33; 439 So.2d at 898.

The amplified Terry trend is reflected in Adams v. Williams, 407 U.S. 143 (1972) which extended the Terry holding to an investigative stop based on an informant's report rather than on a police officer's own observations. This Court announced an exception to the probable cause requirement in United States v. Brignoni-Ponce, 422 U.S. 873 (1975) by permitting border patrols to detain vehicles that they suspected of containing illegal aliens. The

detention is to be reasonable and for only so long as it takes to enforce the immigration laws. Then in Michigan v. Summers, 452 U.S. 692 (1981), law enforcement lacked probable cause to arrest an individual before the search of a house pursuant to a warrant. This Court upheld the detention of the individual while the search was conducted. Unlike Royer v. Florida, __U.S.__, 75 L.Ed.2d 229 (1983), the seizure of Joe Hayes was brief. Police had an individual on stand by to process the prints. The detention was as brief as humanly possible. Joe Hayes was detained for the brief period of time it took to transport him to the police station; secure his fingerprints; and, view the fingerprint comparison.

On alternate constitutional grounds (against these recent holdings), an appli-

cable deus ex machina of affirmance is gleaned from Justice Stewart's dissent in Davis v. Mississippi, 394 U.S. 721 (1969) and this Court's recent decision in Nix v. Williams, __U.S.__, 81 L.Ed.2d 377 (1984). The dissent of Justice Stewart came to pass:

> At the original trial the victim of the rape, under oath, positively identified the petitioner as her assailant. There now exists, therefore, ample probable cause to detain him and take his fingerprints.
>
> (text of 394 U.S. at 730)

As predicted by Justice Stewart, John Davis was convicted on retrial. Davis v. State, 255 So.2d 916 (Miss. 1971), cert. denied, Davis v. Mississippi, 409 U.S. 855 (1972). In Davis v. Mississippi, 394 U.S. 721 (1969), John Davis asserted that identity would never had been known but for the unlawful arrest/detention/seizure. The second conviction was affirmed because the victim was able to identify John Davis

without the use of any evidence which evolved from the unlawful arrest. In the case at bar, Julianne Hollander (the victim: a 51 year-old female bank teller), gave graphic testimony as to Joe Hayes' statements: "I want to feel your cunt" and "One scream out of you, lady, and you're dead." (State Court Record 283). Mrs. Hollander testified as to both vaginal and anal penetration. (State Court Record 283, 284). The victim made positive in-court identification of Joe Hayes (State Court Record 287). So it follows here, as in Davis v. State, 255 So.2d 916 (Miss. 1971), retrial shall, without question, result in a second conviction!

This clairvoyance by Justice Stewart was embodied in Nix v. Williams, __U.S.__, 81 L.Ed.2d 377 (1984). An "inevitable discovery" exception to the exclusionary rule (where a right-to-counsel violation

exists) applies to Fourth and Fifth Amendment claims. In Brewer v. Williams, 430 U.S. 398 (1977) collateral relief was granted; but, this Court suggested that, despite suppression of defendant's statements, evidence of the location and condition of the victim's body might be admissible on retrial based on inevitable discovery.

The Chief Justice (writing for the majority) focused on the "independent source doctrine". That doctrine "teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position than they would have been in if no police error or misconduct had occurred." Id. at 387. In footnote 4 of Nix, the intent, aim, and

object of the opinion is stated: "The purpose of the inevitable discovery rule is to block setting aside convictions that would have been obtained without police misconduct." Id. at 387, fn 4. The Chief Justice goes on to point out:

> Fairness can be assured by placing the State and the accused in the same positions they would have been in had the impermissible conduct not taken place. However, if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings. In that situation, the State has gained no advantage at trial and the defendant has suffered no prejudice. Indeed, suppression of the evidence would operate to undermine the adversary system by putting the State in a worse position than it would have occupied without any police misconduct.
>
> (text of 81 L.Ed.2d at 389, 390)

In dissent, Justice Brennan (with whom Justice Marshall joins) recapitulates the

majority holding: "...the Court concludes that unconstitutionally obtained evidence may be admitted at trial if it inevitably would have been discovered in the same condition by an independent line of investigation that was already being pursued when the constitutional violation occurred." A preponderance of the evidence standard was used for the "inevitable discovery" determination. Id. at 384.

On this record, if there were a Fourth Amendment deprivation in taking Joe Hayes fingerprints (and there is not), then what facts support by a preponderance of the evidence inevitable discovery? At the hearing on the motion to suppress, there is uncontraverted testimony that Joe Hayes' herringbone pattern tennis shoes were seized in plain and open view from his front porch by police prior to formal arrest. J.A. 14; 21-22. This type of

shoe had left an impression at the rape scenes. J.A. 20. In his opinion, Judge Campbell points out:

> Initially, we note that even though the officers did not have a warrant, Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), does not apply here since the discussion about fingerprints and the seizure of the tennis shoes occurred on the front porch of appellant's home. Because the officers found the shoes on appellant's front porch, the trial court did not err in admitting the shoes into evidence. State v. Rickard, 420 So.2d 303 (Fla. 1982), demonstrates that these shoes clearly were not in a constitutionally protected area at the time the officers saw them and so were subject to seizure.
>
> (J.A. 34; 439 So.2d at 898)

Upon matching the seized shoes with the shoe prints left at the rape scenes, police would have had probable cause for arrest. Once arrested, Joe Hayes would have been fingerprinted pursuant to Florida booking procedures. At that point, any question about fingerprint identification is moot. Joe Hayes' tennis shoes had

been seen on his front porch one week before his fingerprints were solicited. This raised added suspicion focusing on him as the target. (State Court Record 500-501). At trial, the herringbone pattern tennis shoes matched the shoe print Joe Hayes left at Mrs. Hollander's residence at the time of the rape. (State Court Record 459-471). In fact, herringbone shoe prints were found at <u>all</u> rape scenes. J.A. 21. Putting Joe Hayes' fingerprints to the side, police had the following as pieces to the puzzle:
(1) the obsessive-compulsive behavior pattern evidenced by the similarities of the victims' house numbers, Joe Hayes' place of employment, and residence J.A. 16-17;
(2) a psychosexual aberration focusing on a marked preference for anal intercourse J.A. 21; (3) a dislike of older women J.A. 21; (4) a fear of younger women

J.A. 21; (5) composite picture of Joe Hayes gleaned from victims J.A. 14-15; (6) documents seized under court order from Joe Hayes' place of employment (care center) reflecting bizarre behavior and dislike of older women J.A. 10; 21; (7) police interviews with all rape victims (State Court Record 486); and, (8) the herringbone tennis shoes seen on Joe Hayes' front porch one week before fingerprint solicitation (State Court Record 500, 501) and when fingerprints were solicited. J.A. 21. Before securing Joe Hayes' fingerprints, police suggested they had probable cause to arrest. J.A. 22. Once police matched the shoe print to the shoe sole itself, there is no question but that fingerprints taken as part of the arrest/booking procedure would have been admitted at trial. This evidence would have been discovered in the same

condition by an independent line of investigation that was already being pursued.

United States v. Crews, 445 U.S. 463, 475-476 (1980) distinguishes Davis v. Mississippi, 394 U.S. 721 (1969) on this theory. In the case at bar (like Crews and unlike Davis) the criminal investigation had focused on the target and police had independent reasonable grounds to suspect his culpability. Irrespective of Joe Hayes' detention, his fingerprints would have been obtained. Justice Brennan in Crews, Id. at 470, fn 11 recognized the three exceptions to the exclusionary rule: (1) Nardone v. United States, 308 U.S. 338, 341 (1939), (attenuation); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (independent source); and, United States ex rel. Owens v. Twomey, 508 F.2d 858, 865 (7th Cir. 1974)

(inevitable discovery). Julianne Hollander's independent recollection of Joe Hayes antedates his detention. The in-court identification by the victim is admissible.

Thus, on alternate constitutional grounds, there exists a rationale not to apply the exclusionary rule. The fingerprint evidence, seen from this light, is constitutionally admissible under the inevitable discovery rule.

CONCLUSION

Upon this review of the applicable case law, Florida concludes as follows:

(1) There is a scarcity of cases where citizens are asked to consent to warrantless detentions so that their fingerprints might be lifted to be compared with those found at the crime scene. The facts are narrow; and, the holding of the Florida district court of appeals is restricted to them. It is not illogical for Florida to argue that Terry v. Ohio, 392 U.S. 1 (1968) be extended to permit such brief detentions. These narrow facts reflect such a minimal intrusion upon a citizen that there is no Fourth Amendment deprivation. To require, under these narrow facts, judicial authorization or approval at this investigatory stage would have a chilling effect on consensual encounters and reasonable detentions based

on articulable facts.

(2) There is no reasonable expectation of privacy in a citizen's fingerprints; nor, does the taking of impressions reflect a meaningful intrusion into Joe Hayes' possessory interests in his fingerprints. Fingerprints are nontestimonial.

(3) The detention of Joe Hayes is reasonable. He was detained no longer than necessary to complete the fingerprint match.

(4) On alternate constitutional grounds, Nix v. Williams, __U.S.__, 81 L.Ed.2d 377 (1984), sets forth an "inevitable discovery" exception to the exclusionary rule. In this case, the fingerprints would have been ultimately discovered. The purpose of this rule is to

bar setting aside convictions where police misconduct exists.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

WILLIAM I. MUNSEY, JR.
Assistant Attorney General
1313 Tampa Street
Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

Counsel for Respondent

CERTIFICATE OF SERVICE

I, William I. Munsey, Jr., a member of the Bar of the Supreme Court of the United States and counsel of record for the State of Florida, Respondent herein, hereby certify that on December , 1984, pursuant to Rule 46.5, Rules of the Supreme Court, I served copies of the foregoing Brief for Respondent on Joe Hayes, Petitioner herein, by depositing such copies in the United States Post Office, Tampa, Florida, with first class postage prepaid, properly addressed to the post office address of Michael E. Raiden, Esquire, the above-named Petitioner's counsel of record, at Office of the Public Defender, Hall of Justice Building, 455 North Broadway Avenue, Bartow, Florida 33830.

All parties required to be served have been served. Dated December , 1984.

WILLIAM I. MUNSEY, JR.
Assistant Attorney General

OF COUNSEL FOR RESPONDENT